MISSISSIPPI LAW JOURNAL

SEVENTY-FIFTH ANNIVERSARY

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THE ORIGINS OF THE MISSISSIPPI LAW JOURNAL[†]

Michael de L. Landon[*]

In October, 1928, volume one, number one, of the Mississippi Law Journal was run-off on the printing presses of the McCowat-Mercer printing house in Jackson, Tennessee, and mailed out to its more than one hundred initial subscribers. The title page of the new periodical bore the date July, 1928,[1] and carried the names of its board of student editors at the University of Mississippi Law School. The chief editor was Dugas Shands of Cleveland and the note editor was John S. Satterfield of Port Gibson who would later serve both as president of the Mississippi State Bar (1955-56) and as president of the American Bar Association (1961-62).[2] Also listed were the names of an "advisory committee" of members of the bar. Chaired by Dean T.C. Kimbrough of the Law School, it included Judge W.C. Sweat of Corinth, Robert H. Powell of Canton, M.S. Connor of Seminary who three years later would be elected governor of the state, George W. Currie of Hattiesburg who was president of the Mississippi Bar Association that year, and the Bar Association's secretary-treasurer Louis M. Jiggitts of Jackson. The publication was subtitled the "Journal of the State Bar Association," and its contents consisted of the proceedings of the Association's twenty-third annual meeting held the previous spring at

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[*] Professor of History, University of Mississippi. B.A., 1958; M.A. 1961, Oxford, University; Ph.D., University of Wisconsin, 1966.

[1] A new story in the Mississippian announced that the first issue would be printed in mid-October, Mississippian, Sept. 29, 1929, at 1, col. 1.

[2] Charles S. Sykes served as case editor, H. Edwin White as business manager and George H. Hill, Jr., as assistant business manager. The assistant editors were Alex J. Brunini, F.W. Cunningham, E.P. Jones, Jr. W.R. Newman, Jr., E.L. Shelton, C.H. Westerbrook and W.H. Anderson. *Id.* at 8, col. 3.

Gulfport. Probably the most significant decision taken at the meeting had been to underwrite the publishing of a journal for Mississippi lawyers.

The idea of doing so was one that had been around for along time. Sixteen years earlier, at the State Bar Association's seventh annual meeting, held in Jackson in May, 1912, a resolution had been passed calling on the groups president to appoint a board of five directors to plan the publication of "a Magazine to be devoted to the interests of this association and to the lawyers of Mississippi."[3] Moved by R.N. Miller of Hazelhurst, the resolution had called for those appointed as directors to arrange for the magazine to be published on a monthly basis in Jackson. Further resolutions stipulated that they were to hire a chief editor and to invite the deans of the state's two law schools, at the University of Mississippi and at Millsaps College,[4] to serve as honorary, associate or contributing editors. But control of the periodical's general policies, including the setting of subscription rates and determining the amounts charged for advertising, was to remain vested in the directors. All the Association's members were urged to subscribe and to encourage their fellow lawyers to send in subscriptions also. To get the magazine off to a good start a final resolution authorized the setting aside of one thousand dollars of the Association's funds to cover the initial publishing expenses; but with the proviso that if that full amount were ever expended publication would have to cease.

Apart from that one restriction, the final decision concerning the feasibility of publishing the magazine was left up to the directors. A year later, in 1913 in Greenwood, R.H. Thompson of Jackson gave the annual meeting a very discouraging report as to their findings. A survey had shown that very few of the state's lawyers were prepared to commit themselves in advance to subscribe to it; and potential advertisers had manifested little interest in paying for space in a professional journal with a very limited circulation. Although only one hundred dollars out of the thousand allocated had as yet been spent, he and his fellow directors had decided to recommend that the idea of the magazine be dropped. After considerable discussion a majority of the members present finally, though regretfully, agreed.[5]

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[3] MISSISSIPPI STATE BAR ASSOCIATION, 1912 PROCEEDINGS at 9.

[4] The law curriculum established at Millsaps in 1896 was terminated in 1918 because most of the students enrolled in it had left to join the armed forces. *See* II R. MCLEMORE, A HISTORY OF MISSISSIPPI 381 (1st ed. 1973).

Nine more years elapsed; and then, at the 1922 annual meeting in Vicksburg, the members of the Bar Association agreed at the request of Dean Kimbrough to hear a proposal from a University of Mississippi Law School student, John Edwards McCall.[6] The first law student ever to be invited to address the Association, he told them that he and his seventy or so fellow students, "including three girls," were interested in establishing, under the auspices of their honor society, the Blackstone Club, a "Mississippi Law Review" patterned after the law reviews published by Harvard and other prestigious law schools in the East. Their plan was for it to be edited and published by a "Board of Control" made up of three Blackstone Club members and three other law students. He was there to ask for the Association's help in getting the project launched. Specifically it was hoped that every member would be willing to take out a two-dollar subscription, and that many of them would be interested in submitting articles for publication. Letters soliciting support, he told them, would be mailed to every lawyer in the state early the following autumn.

By early October, in fact, chief editor Joseph M. Howorth of Cleveland was able to tell a Blackstone Club meeting that one hundred and forty subscriptions to the planned review had already been received, and that three hundred and thirteen dollars worth of advertising space had been sold to firms such as the West Publishing Company of Minneapolis. In addition to the Bar Association, the justices of the Mississippi Supreme Court and the Law School faculty had all expressed their approval of its publication. The student weekly newspaper, the *Mississippian*, quoted Dean Kimbrough as saying: "I have carefully gone over the proposed plan . . . for the publication of a periodical to be known as the Mississippi Law Review, and most heartily approve the same."[7] The Review would contain "notes on Recent Decisions, critical book reviews, news of the Mississippi Bar Association, and other articles of interest contributed by leading lawyers of the state," Howorth told the *Mississippian*.[8]

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[5] MISSISSIPPI STATE BAR ASSOCIATION 1913, PROCEEDINGS at 6, 10, 24-25.

[6] *Id.*, 1922 PROCEEDINGS at 168. The proceedings identify the students as "McGill"; however, the Ole Miss Annual for 1922 lists no law student McGill, and Mrs Lucy Somerville Howorth told the author by telephone (Jan. 31, 1979) that she believed it must have been McCall.

Howorth had been elected business manager of the proposed Review at the Blackstone Club meeting the previous spring by a narrow margin over Levi M. Pettis of College Hill in a hotly contested election. At the same meeting Addie M. McCain, vice-president of the first year law class, had been elected chief editor by acclamation. Miss McCain had not returned to school that fall, however, so Howorth had been elected to serve as editor in her place and Pettis had been elected business manager. Associate editors were L.C. Corban A.H. Bell, J.C. Hathorn, F.B. Jackson, D.R. Stump, and a future dean of the Law School, R.J. Farley.[9]

Although it was not published as frequently as "monthly November to June," as its founders had intended, the *Mississippi Law Review* flourished for a period of almost two years. Thanks to the good offices of Louis M. Jiggits, who had returned to the law school to finish his degree after two years at Oxford University on a Rhodes Scholarship, one of its earliest contributors was Oxford's Vinerian Professor of English Law, W.S. Holdsworth, the most distinguished legal scholar of that day.[10] In May, 1923, L.C. Corban succeeded Howorth as chief editor and D.R. Stump became business manager for 1923-24.[11] In 1924 the *Mississippi Law Review* was reportedly a factor in gaining for the Law School accreditation with an "A" rating by the prestigious American Association of Law Schools. But in the spring of that same year, the state legislature voted to give the colleges and universities a considerably smaller appropriation than they had been receiving. Forced to economize, the Law School faculty decided to cease subsidizing the *Review* which, therefore, ceased publication.[12]

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[7] Mississippian, Oct. 6, 1922, at 1, col. 2. Advertisements for the *Law Review* appeared in the Mississippian on Oct. 13, at 3, col. 1, and Oct. 20, at 3, col. 1.

[8] *Id.*, Oct. 6, 1922, at 3, col. 5.

[9] MISSISSIPPI STATE BAR ASSOCIATION 1922 PROCEEDINGS at 169.

[10] Telephone conversations with Mr. Joseph M. Howorth and Lucy Somerville Howorth of Cleveland, Miss., Jan. 31, 1979.

[11] Mississippian, May 18, 1923, at 1, col. 2.

Four more years elapsed before the members of the State Bar Association, meeting in Gulfport in 1928, were told by their president, R.E. Wilbourn, that he considered it "highly desirable" that the Association publish some sort of periodical through which it could "more easily enlist and retain the interest of its individual membership."[13] Louis M. Jiggitts, who had recently been appointed secretary-treasurer of the Association, had come up with the suggestion that Mississippi follow the example of Minnesota where the *Minnesota Law Review* was published monthly on a joint basis by the state bare and the state university law school.[14] Mississippi, it was proposed, should publish a quarterly "law review and journal" on the same basis.[15] The first number of each annual volume, published in the summer, would contain the proceedings of the Bar Association's meeting held the previous spring.[16] More than $300, Wilbourn reminded them, had been spent on printing the 1927 proceedings. That amount contributed each year, when combined with a small income from subscriptions and advertising, would be enough to pay for the new publication. To ensure that the money was well-spent, a boar of directors, consisting of Dean Kimbrough and the Bar Association's officers, would oversee the work of the law student staff who would do the actual editing and publishing.[17] Before adjourning on May 3, on a motion by

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[12] Telephone conversations, *supra* note 10. Unfortunately, the University of Mississippi Law Library does not at present have any of the copies of the *Mississippi Law Review* but steps are being taken to obtain them.

[13] 1 MISS. L.J. 14, 49 (1929).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 107-11.

J.M. Thomas of Tupelo seconded by Gabe Jacobson of Meridian, the members voted their approval of the plan.[18]

Nearly five months later, at the end of September, 1928, editor Shands announced on the University of Mississippi campus that the first issue of the *Mississippi Law Journal*, the "July" issue, would be "placed in the hands of the printer on October 3."[19] Subscriptions had been coming in steadily to the publication, which was intended to "reflect the activities of the legal profession in Mississippi and to some extent over the nation," Shands said.[20] One of its most important functions would be to publish Mississippi annotations to the American Law Institute's "Restatements" of the law.[21]

The second issue of Volume I, bearing the date "October," in fact contained annotations to the Restatement of Torts compiled by Chief Justice Sydney Smith of the state supreme court.[22] The anticipated four issues were eventually published that first year, totalling 468 pages. At their 1929 annual meeting in Clarksdale, the Bar Association members were told that one hundred and forty of their members had taken out subscriptions and so had forty-six other Mississippi lawyers.[23] All of the law students at the University had subscribed, and subscriptions had come in from eighty-six American law libraries and about a dozen libraries and individuals overseas.[24] The Bar Association had contributed $491.85 to the cost of publishing the first volume.[25] At Jiggitts' suggestion, and on the understanding that every member would receive free copies, a resolution was passed to contribute $800 towards publishing Volume II.[26]

Volume II was the first to include book reviews and was 492 pages in length. The *Mississippi Law Journal* appeared to be securely established as an institution. But at their 1930 meeting in Biloxi the Bar Association, whose membership had fallen in one year from over five hundred to under three hundred, "by reason of the recent depression," cut their subsidy to the *Journal* back to $400.[27] Volume III (1930-31) therefore contained a total of only 398 pages. And matters grew worse; Volume IV (1931-32) consisted of only three issues and contained only 225 pages. To many it must have seemed probable that the *Law Journal*, like its predecessor the *Law Review*, would die an early death because of inadequate funding. What saved it was the Unified Bar Act passed by the state legislature in 1932[28] which, by requiring every one of the nearly 1300 lawyers in the state to become dues-paying members of what was now to be called the Mississippi State Bar, rescued both the organized bar and the *Law Journal* from possible extinction.

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[18] *Id.* at 110-11.
[19] *Mississippian*, Sept. 29, 1928, at 1, col. 1.
[20] *Id.*
[21] *Id.*
[22] 1 MISS. L.J. 236, 236-67 (1928).
[23] 2 MISS. L.J. 15, 39-40 (1929).
[24] *Id.* at 40.
[25] *Id.* at 41.
[26] *Id.*

At the first annual meeting of the unified bar, held in Jackson in September, 1932, the members approved an allocation of $1200 to subsidize Volume V of the *Mississippi Law Journal*.[29] Thus the *Journal* was enabled to continue to fulfill the hope expressed by Dean Kimbrough in the preface that he wrote to Volume I, number one, that it become "a permanently established periodical that will render through the years a most distinct and helpful service to the judiciary, the bar, and the laws students of the state."[30]

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[27] 3 MISS. L.J. 4, 65 (1930). An audited income statement prepared for the fiscal period 1929-30 showed that the *Journal* suffered a loss of $59.98. *Id.* at 45.

[28] 1932 Miss. Laws ch. 121.

[29] 5 MISS. L.J. 2, 61 (1932).

[30] 1 MISS.L.J. iv, v (1928).

WHEN DEFERENCE BECOMES ABDICATION: IMMUNIZING WIDESPREAD BROKER–DEALER PRACTICES FROM JUDICIAL REVIEW THROUGH THE POSSIBILITY OF SEC OVERSIGHT

Francis J. Facciolo[*]

I. INTRODUCTION

This Article uses three groups of recent securities law cases to examine the respective roles of the Securities and Exchange Commission (SEC) and the courts, both federal and state, in determining whether a fraud involving a broker-dealer and its customers has occurred. In these recent cases, the courts at both the federal and the state level have evinced a great hesitancy in adjudicating alleged violations by broker-dealers of fiduciary or fiduciary-type obligations owed to their customers. The sweep cases and the national best bid and offer (NBBO) case have all involved class actions alleging that broker-dealers have committed securities fraud under section 10(b) of the Securities Exchange Act of 1934 (1934 Act) and Rule 10b-5 promulgated thereunder by the SEC, as well as under applicable state law. The payment for order flow cases have involved, in contrast, allegations of fraud primarily under state law. In all three groups of cases, the alleged fraud has been carried out by means of allegedly non-disclosed widespread industry practices, which either involved broker-dealers receiving payments that allegedly were not disclosed properly to their customers (the sweep and payment for order flow cases) or payments allegedly in violation of their duty of best execution (the NBBO case). All three groups of cases also involved practices that the SEC has spent considerable time and resources studying. All of these practices were in areas subject to SEC regulation, even if the regulation did not address the particular challenged practices. The SEC regulatory regime, thus, arguably took into account these practices.[1]

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[*] Francis J. Facciolo is on the faculty of the St. John's University School of Law. The Author thanks Andrea Arrigo, Godric Shoesmith, David M. Eskew, and Scott B. Josefsberg for their research assistance; William H. Manz and the St. John's University School of Law library staff for their generous help; and Dean Joseph W. Bellacosa for two summer research grants, which enabled the Author to do much of the work on this Article. In addition, a number of the attorneys who have worked on the cases discussed in this Article have been exceptionally generous in providing copies of the briefs and other pleadings. In particular, the Author thanks Maàia D. Meleñdez and A. Robert Pietrzak, both of Sidley Austin Brown & Wood LLP; James N. Benedict and C. Neil Gray, both of Clifford Chance Rogers & Wells LLP; Stuart D. Wechsler of Wechsler Harewood Halebian & Feffer LLP; David A. Brownlee of Kirkpatrick & Lockhart LLP; Evan M. Tager of Mayer, Brown, Rowe & Maw; and Seth D. Rigrodsky formerly of Morris and Morris.

Faced with the technical issues of securities regulation that were involved in these cases, the courts have chosen to step aside, leaving the resolution of these issues to the SEC. A variety of rationales have been proffered by the courts: deference to administrative interpretation by the SEC of its own rules; preemption by SEC regulation of conflicting state law; and the unsuitability of class actions to resolving such issues. Whatever the rationale that a court has put forth, there is always an underlying hesitancy in adjudicating complex securities regulation issues when the adjudication can have a nationwide impact and consistency is a desirable public policy. In a case brought under a California anti-fraud statute and involving trading ahead, the defendant broker made the broadest formulation of the deference argument. Under this formulation, a court should "abstain from exercising [its] equity powers" when one of two factors is present: either "more efficient regulation is provided by specialized federal agencies" or "adjudication of a complaint would require complex economic judgments that are better left to legislative or administrative determination."[2]

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[1] For a general survey of cases challenging widespread securities industry practices, including the three subsets described in this Article, see A. Robert Pietrzak & Daniel A. McLaughlin, *Survey of Recent Class Actions Challenging Securities Industry Practices,* BROKER-DEALER REG. 2000 at 197 (ALI-ABA Course of Study No. SE49, 2000). In a recent roundtable of in-house lawyers of major financial institutions sponsored by King & Spalding, the suggestion was made that class actions such as the ones discussed in this Article have become more common because of "the concerns the plaintiff's bar had about the PSLRA of whether their bread and butter was going to be taken away, and, if so, that they had better think of something new." King & Spalding, *Complex Litigation in the Financial Services Market*, 227 N.Y.L.J. 8 (June 2002) (article included as a special edition insert) (quoting Martha E. Solinger, co-head of Global Litigation and Managing Director, Lehman Brothers).

The excessive deference exhibited in these three groups of cases is consistent with the theories advanced in two recent articles on securities law that have argued that federal judges have used various heuristics, or short cuts, to avoid deciding securities law cases. Professor Sale has focused on the Private Securities Litigation Reform Act of 1995 (PSLRA) and the cases decided under the PSLRA, concluding that "[t]he analysis reveals that the district courts have eagerly and overwhelmingly accepted the 'opportunity' Congress offered them by creating and using heuristics to eliminate cases on motions to dismiss that are arguably better preserved for summary judgment."[3] Professors Bainbridge and Gulati have focused on a larger sample of doctrines in securities litigation that usually involve issues of materiality or scienter to come to the conclusion that

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[2] Respondent's Brief at 41–43, Roskind v. Morgan Stanley Dean Witter & Co., 95 Cal. Rptr. 2d 258 (Ct. App. 2000) (No. A087546). [hereinafter *Roskind* Respondent's Brief]. Interestingly, the published opinion in that case discusses only preemption and not the abstention doctrine. *See* Roskind v. Morgan Stanley Dean Witter & Co., 95 Cal. Rep. 2d 258 (Ct. App. 2000). For a similar type of argument concerning class certification, see Securities Industry Association Brief in Support of the Brief for Appellees Merrill Lynch, Pierce, Fenner & Smith, Inc.; Paine Webber, Inc.; and Dean Witter Reynolds, Inc. at 12–15, *Newton v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 259 F.3d 154 (3d Cir. 2000) (No. 94-CV-05343). As the Securities Industry Association (SIA) brief articulated the issue of the appropriate forum to review industry-wide standards,

> [p]ermitting best execution standards to be formulated in a class action format would create an uncertain future for brokerage firms seeking to comply with their duties of best execution in this constantly changing environment. Instead of being able to rely on clear regulatory guidance and industry standards, they would be subject to a highly uncertain liability theory governing best execution which would be impossible to apply within the context of unique, individualized transactions. Such an amorphous standard would be antithetical to the need for certainty in the securities markets that federal courts have long recognized.

Id. at 13 (footnote omitted).

[3] Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903, 904–05 (2002).

> [i]nstead of leaving those determinations for trial, . . . judges are using substantive heuristics to dispose of securities cases at the motion to dismiss stage. In contrast to prior commentary, however, we argue this result reflects not a pro-defendant bias but rather institutional constraints that give judges incentives to eliminate securities cases from their dockets with minimal effort.[4]

Professors Bainbridge and Gulati do not ascribe any particular political orientation to judges. Rather, they are concerned primarily with the institutional pressures on judges.[5] In their view, the three most important institutional features are "(1) cognitive and resource constraints; (2) constraints imposed by the norms of judging; and (3) agency problems that arise from using clerks in the writing process."[6] These institutional features provide incentives for judges to avoid "tackl[ing] the complex issues [of securities law cases] head on" because such effort "would require time—and resource-consuming effort, for which the judge and the clerks get little reward" and because judges "know . . . they are likely to get it wrong and attract criticism."[7] In Bainbridge and Gulati's view, judges respond to these constraints by creating heuristics. Each heuristic then becomes more effective as more cases use it.[8]

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[4] Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does - Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 87-88 (2002).

[5] *Id.* at 88–89.

[6] *Id.* at 100.

[7] *Id.* at 111.

[8] *Id.* at 116. Each individual judge and clerk avoids criticism about her use of a heuristic because the problems with heuristics only appear when a large sample of cases is examined. Judges and their clerks, however,

> do not decide securities cases on anything resembling a large scale. Indeed, even a circuit court as a whole is unlikely to see more than a handful of securities cases during a year. In an individual case, the heuristic thus may be applied with each court plausibly claiming the case has some special set of facts that permit its application. Flaws in the doctrine appear only when cases from the different courts are put together.

Professor Sale tells a very similar story, although she points to the pro-defendant bias among prestige- seeking judges as one motive propelling judges towards the use of heuristics.[9] Professors Bainbridge and Gulati, on the other hand, do not believe that the use of heuristics is motivated by a pro-defendant bias.[10]

Looking outside the confines of securities law to those of administrative law in general, it is possible to understand the current Supreme Court's administrative law jurisprudence as an attempt to apply judicial heuristics to relieve judicial work load. Insofar as the Court has extended undue deference to administrative agencies' interpretations of their own regulations, policy statements made without following the notice and comment procedures provided for by the Administrative Procedure Act, interpretations of statutes set forth in informal formats and litigating positions,[11] it has ensured that cases involving these types of administrative actions are subject to, at best, minimal judicial review. The cases described in this Article also extend undue deference to both actual SEC actions and potential actions. In this sense, these cases are consistent with the spirit of the Court's administrative law jurisprudence, al-

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Id. at 115–16.

[9] Sale, *supra* note 3, at 911–12. As Professor Sale articulates this point, judges may be influenced to be pro-defendant by two different sources. She argues that the defendants' bar is larger than the plaintiffs' bar, and that the plaintiffs' bar is unpopular and an unlikely source for judges. *Id.* In addition, she argues that in most class actions, plaintiffs care much less about the outcome than the defendants. *Id.* at 912. In other words, displeasing the plaintiffs will be more than compensated for by the gratitude of the defendants. *Id.*

[10] Bainbridge & Gulati, *supra* note 4, at 87–88. *But see* Donald C. Langevoort, *Are Judges Motivated to Create "Good" Securities Fraud Doctrine*, 51 EMORY L.J. 309, 313–17 (2002) (commenting on Bainbridge & Gulati's article and arguing that although "cognitive sloth is a sizable part of the story," it is not a sufficient explanation, and that it is also necessary to factor in "a shift in ideology of the judiciary leading to a pronounced pro-defendant bias").

[11] *See* Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 4-23 (1996). Professor Anthony never uses the concept of judicial heuristics, but he does describe a situation where "[t]he Court's tests and dicta . . . set up free zones within which agencies can create and enforce obligations or standards that exceed statutory authorities and are unchecked by effective judicial review." *Id.* at 4. In other words, the Court has abdicated "the normal duty of the courts to interpret statutes." *Id.* at 20.

though these cases are not explicitly based upon the various doctrines set forth by the Court.

This Article argues that deference to the SEC is inappropriate when neither the doctrines of primary jurisdiction or preemption apply. Determinations of whether a misrepresentation or omission has been made, the materiality of the misrepresentation and all the other elements of a section 10(b) action are all areas in which the courts have great expertise. In fact, the fraud that section 10(b) reaches is based on state common law fraud.[12] To allow industry-wide practices to escape judicial scrutiny because the SEC has the authority— which it has not exercised—to regulate these practices is, in many cases, to deprive customers—who were arguably harmed by these practices—of any effective review of the practices to determine if harm was, in fact, inflicted.

Although it is a well respected administrative agency, the SEC is subject to heavy political pressures when it adopts a position unpopular with the financial services industry. At the end of the day, the SEC's budget is subject to congressional control and, at least recently, Congress has not been hesitant in reminding the SEC of this fact in order to influence SEC action.[13]

Perhaps the best known recent example of this pressure occurred during the late 1990s when then SEC Chairman Arthur Levitt attempted to separate the auditing and consulting functions of major accounting firms. The initial step was the creation of a new body, the Independence Standards Board (ISB), in May 1997.[14] The ISB was the result of a year of negotiation between the SEC and the American Institute of Certified Public Accountants (AICPA).[15] Over the next two years, the ISB considered the issue of auditor independence without ever taking a position.[16] In June 2000, the SEC proposed rules restricting the types of consulting work that auditors could do for their clients.[17] The accounting firms mounted a major lobbying effort,[18] which led the SEC in November 2000, to adopt

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[12] See *infra* text accompanying notes 299-302.

[13] *See* ARTHUR LEVITT & PAULA DWYER, TAKE ON THE STREET 132-33 (2002) (describing then SEC Chairman Levitt's concern that the SEC's budget would be cut as "retribution" for its proposals in the late 1990s on auditor independence and stating that "[n]ever before had the SEC faced such a threat to its independence").

[14] *Id.* at 119; *see also* Albert B. Crenshaw & Brett D. Fromson, *A Conflict for CPAs? Firms' Independence Questioned as Ties to Clients Grow,* WASH. POST, Mar. 29, 1998, at H1 (describing the ISB as a response to new competitive pressures in which the major accounting firms attempted to use their traditional auditing function as a "foot in the door" to sell more expensive consulting services to their clients); Jim Kelly, *SEC Warns US Auditors of Self-Regulation Review,* FIN.

TIMES, Feb. 23, 1998, at 6 (describing the SEC's initial hopes for the ISB to hold public meetings and take the lead in regulating auditor independence).

[15] LEVITT & DWYER, *supra* note 13, at 119; *see also* Crenshaw & Fromson, *supra* note 14 (stating the AICPA's position that combining auditing and consulting functions helped accounting firms to gain more expertise).

[16] LEVITT & DWYER, *supra* note 13, at 120. As Chairman Levitt described the situation,

> [t]he AICPA deftly maneuvered itself into position with the ISB. It supplied the ISB's agenda, staff, and funding. It soon became clear to me that the AICPA had gone along with the ISB's creation because it believed it could control the group. This was typical for the AICPA . . . . In protest, I boycotted the ISB's first meeting.

Id.

[17] *See* Revision of the Commission's Auditor Independence Requirements, Exchange Act Release No. 34-42,994, 65 Fed. Reg. 43,148 (July 12, 2000) [hereinafter Auditor Independence Proposing Release]. The expressed goal of the new rules was to "promote investor confidence" by ensuring "that the auditor is truly independent from the issuer." *Id.* at 43,148. In order to promote confidence among investors, the SEC explained, the auditor must *appear* to investors to be independent of its client. *Id.* at 43,151. The SEC listed four general situations in which an auditor would not appear to be independent: where the auditor "(i) [h]as a mutual or conflicting interest with the audit client, (ii) audits the accountant's own work, (iii) functions as management or an employee of the audit client, or (iv) acts as an advocate for the audit client." *Id.* at 43,149. Finding that the increasing range of services offered by accounting firms raised concerns about the objectivity of auditors, *id.* at 43,154, the SEC proposed banning accounting firms from performing certain non-audit functions for their clients, *id.* at 43,155. The proposal specifically banned the auditor from providing bookkeeping services to the audit client, *id.* at 43,168, from designing or implementing a financial information system for the client, *id.*, from auditing its own work, *id.* at 43,169, and from occupying a position in which the auditor advises the company on financial, management, human resource or legal issues, *id.* at 43,169-72. Additionally, the rules as proposed would have banned the auditor from having any financial, employment or business relationship with the client that could impair the independence of the auditor. *Id.* at 43,159-67. The proposal also mandated that a company make disclosures in its proxy statements of non-audit services performed for the company by its auditor so that an individual investor may judge for herself the integrity of a company's financial information. *Id.* at 43,156.

[18] LEVITT & DWYER, *supra* note 13, at 128-38. As Chairman Levitt describes

a weakened final version of the rules.[19]

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the results of the accounting firms' lobbying effort, "Soon [after the proposed rules were released], I was spending almost all my time deflecting a barrage of phone calls, visits, and letters from House and Senate members." *Id.* at 131. The accounting firms achieved their lobbying strength through their campaign contributions. *Id.* Indeed, "[n]ot only could the AICPA get lawmakers to contact me on demand, they also persuaded the Senate Banking Committee's Securities Subcommittee to hold a hearing; its chairman, Minnesota Republican Rod Grams, had received $60,000 from the industry." *Id.* (describing *SEC's Proposed Auditor Independence Rules Before the Subcomm. on Sec. of the S. Comm. on Banking, Housing, and Urban Affairs*, 106th Cong. 5-64 (2000)).

[19] *See* Revision of the Commission's Auditor Independence Requirements, Exchange Act Release No. 34-43,602, 65 Fed. Reg. 76,008 (Dec. 5, 2000) [hereinafter Auditor Independence Final Rules]. Continuing on the premise that an auditor must appear to be independent from the audit client for investors to put faith in a public company's financial statements, *see id.* at 76,008, 76,012, the final rules made significant advances in protecting investors and alerting them to possible conflicts of interest, *see* LEVITT & DWYER, *supra* note 13, at 139. As proposed in the proposing release, *see* Auditor Independence Proposing Release, 65 Fed. Reg. at 43,156, the final rules mandated that a public issuer (the audit client) must disclose in its proxy statements the amounts paid to its auditor for non-audit services, Auditor Independence Final Rules, 65 Fed. Reg. at 76,022, 76,055-58. Such disclosures allow investors to "see for themselves how much consulting fees dwarf[] audit fees." LEVITT & DWYER, *supra* note 13, at 138. The final rules did not ban non-audit services altogether, but rather listed certain non-audit services that if provided to an audit client would impair the independence of the auditor. The final rules generally adopted the proposal's bans on auditors performing bookkeeping services for the audit client, Auditor Independence Final Rules, 65 Fed. Reg. at 76,043-44, providing appraisal and valuation services for the client, *id.* at 76,046, performing management functions for the client, *id.* at 76,049, advising the client on human resource issues, *id.*, acting as a broker-dealer for the client, *id.* at 76,049-50, and providing legal services to the client, *id.* at 76,050-51. Unlike the proposing release, which would have banned the audit firm from designing or implementing a financial information system for the client, Auditor Independence Proposing Release, 65 Fed. Reg. at 43,168, the final rules allowed for an auditor to provide unlimited information technology consulting to a client, LEVITT & DWYER, *supra* note 13, at 138, but banned the auditor from actually operating the financial information system, Auditor Independence Final Rules, 65 Fed. Reg. at 76,045. Furthermore, the final rules loosened some of the proposal's bans by limiting the restriction on actuarial services to only those situations in which the client is an insurance company, *id.* at 76,047, allowing a public auditor to perform as much as forty percent of a client's internal audit tasks, *id.* at 76,048, and allowing an auditor to perform expert services for a client, *id.* at 76,043, 76,051.

The list of services specifically banned by the final rule, was not, however, intended to be exclusive. The general standard adopted by the rule was the appearance standard. *Id.* at 76,030-31. Under this standard, an auditor is not "independent with respect to an audit client if the accountant is not, or if a reason-

Similar issues affecting the accounting profession arose in the wake of the Enron and other accounting scandals of 2001 and 2002.[20] The Sarbanes-Oxley Act, the federal act that provided for many reforms of federal securities law in response to these scandals,[21] mandated, among other things, the creation of an oversight board to police auditors.[22] The accounting profession and its congressional supporters again exerted their power to influence the recent selection of head of the Public Company Accounting Oversight Board. Harvey Pitt, then chairman of the SEC, initially favored John H. Biggs to head the board, going so far as to privately assure Mr. Biggs of his support.[23] Republicans and the accounting profession pressured Mr. Pitt to withdraw his support for Mr. Biggs, fearing that Mr. Biggs would be "too tough on the [accounting] industry."[24]

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able investor knowing all relevant facts and circumstances would conclude that the accountant is not, capable of exercising objective and impartial judgment." *Id.* at 76,030.

The SEC again amended its auditor independence rules in January 2003. *See* Strengthening the Commission's Requirements Regarding Auditor Independence, Exchange Act Release No. 34-47,265, 68 Fed. Reg. 6006 (Feb. 5, 2003). The new rules further clarified the scope of non-audit services that an auditor may provide to a client. *Id.* at 6007. In general, the new rules continued the restrictions on the nine specifically listed services in the November 2000 rules, but eliminated almost all significant exceptions in order to further limit the situations in which an auditor could provide such non-audit services. *See id.* at 6010-15. In addition, the new rules reinstated the ban on the provision of expert services, *id.* at 6015-16, which had been proposed in 2000, but not included in the final rules.

[20] *See* Lara Saunders Egodigwe, John C. Long & Nima Warfield, *A Year of Scandals & Sorrow*, WALL ST. J., Jan. 2, 2003, at R10.

[21] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. § 7201, et seq. (2002)). *See generally* UNDERSTANDING THE SARBANES-OXLEY ACT OF 2002: WHAT EVERY CORPORATE & SECURITIES LAWYER NEEDS TO KNOW NOW (PLI Corp. Law and Practice Course, Handbook Series No. B-1345, 2002).

[22] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 755 (codified at 15 U.S.C. § 7213 (2002)).

[23] Stephen Labaton, *S.E.C. Chief Hedges on Accounting Regulator*, N.Y. TIMES, Oct. 4, 2002, at C1.

[24] *Id.* ("Congressional aides and current and former S.E.C. officials say the episode illustrates the continued political influence of the accounting profession despite its defeat on Capital Hill on the legislation . . . establishing the oversight board."); *see also Accountants Get Their Man*, FIN. TIMES, Oct. 29, 2002, at 14 ("The bigger issue is that [Webster's] appointment marks a capitulation by the SEC to pressure from the accounting profession, the very group whose practices

Mr. Pitt then put forward William H. Webster to head the board and Mr. Webster was appointed by the SEC in a three to two vote split by political party, with the Republicans in the majority.[25] Both Mr. Pitt and Mr. Webster resigned shortly thereafter when it became known that Mr. Webster had been on the audit committee of U.S. Technologies, Inc., which company had been sued for fraud.[26] The committee had been notified by the company's accountants in 2002 that U.S. Technologies had "a material weakness in internal control . . . relating to financial and accounting infrastructure" and the committee had taken only limited actions in response.[27] Mr. Pitt, in turn, had not properly investigated these facts nor made adequate disclosure of them to either the White House or the four other SEC commissioners.[28]

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the new board is supposed to scrutinise [sic]."); *Fighting Mr. Biggs*, WALL ST. J., Oct. 4, 2002, at A12 ("All signs suggest [the big accounting firms are] working through Republicans in Congress" to oppose Biggs's nomination.); Peter Spiegel & Adrian Michaels, *Biggs Focus of Political Struggle over Accounts Post*, FIN. TIMES, Oct. 7, 2002, at 6.

[25] Stephen Labaton, *Bitter Divide as Securities Panel Picks an Accounting Watchdog*, N.Y. TIMES, Oct. 26, 2002, at A1; *see also* David S. Hilzenrath, *SEC Likely to Split on Accounting Panel Chief, Democrats Opposing Selection of Webster*, WASH. POST, Oct. 25, 2002, at E01 (discussing political maelstrom surrounding the appointment of Webster over Biggs). For a description of Mr. Webster's government service prior to his appointment, see Neil A. Lewis, *Washington's Mr. Fix-It as Overseer of Accounting*, N.Y. TIMES, Oct. 25, 2002, at C1.

[26] Stephen Labaton, *Audit Overseer Cited Problems in Previous Post*, N.Y. TIMES, Oct. 31, 2002, at A1.

[27] *Id.* For further information on Mr. Webster's role on the audit committee, see Stephen Labaton, *Audit Overseer Being Challenged by Firm He Dismissed at Old Job*, N.Y. TIMES, Nov. 8, 2002, at A1. For Mr. Webster's resignation, see Stephen Labaton, *Webster Resigns as Head of Board to Oversee Audits*, N.Y. TIMES, Nov. 13, 2002, at A1.

[28] Stephen Labaton, *S.E.C.'s Embattled Chief Resigns in Wake of Latest Political Storm*, N.Y. TIMES, Nov. 6, 2002, at A1. The GAO report about the events leading up to Mr. Webster's appointment absolved Mr. Pitt of having any knowledge of the particular events involving the U.S. Technologies' audit committee. U.S. GENERAL ACCOUNTING OFFICE, SECURITIES AND EXCHANGE COMMISSION ACTIONS NEEDED TO IMPROVE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD SELECTION PROCESS, 13–16 (GAO-03-339, 2002). The GAO also reported, however, that, eleven days prior to Mr. Webster's appointment, Mr. Pitt knew that Mr. Webster "was the former chairman of the audit committee of the board of directors of U.S. Technologies, a company that [Mr. Webster] described as on the brink of failure." *Id.* at 11. The GAO never explains why Mr. Pitt did not then make sure that a full review of Mr. Webster's activities was conducted prior to

Although there are no indications in the public record of similar pressures from the plaintiffs' securities law bar, it is quite possible that SEC concerns about this group's political power[29] help to explain the puzzling hesitancy of the SEC in addressing some of the industry-wide practices described in this Article. In the area of payment for order flow, for example, the SEC let the plaintiffs' bar and the broker–dealers litigate for several years starting in 1993 before promulgating a set of

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his appointment. Mr. Pitt evidently relied on the SEC's Chief Accountant, who initially did no more than focus "solely on open or closed enforcement activity involving U.S. Technologies." *Id.* at 15. If he had wished to probe the U.S. Technologies issue, a skilled litigator such as Mr. Pitt should have been able to elicit from the Chief Accountant the limited range of his office's due diligence. There is no evidence in the GAO report of this kind of follow through. The GAO may be correct that Mr. Pitt did not know of Mr. Webster's role in the audit committee; but perhaps an SEC Chairman should be held to a higher standard of knowing what a reasonable investigation for such a politically important past would have revealed. In other words, Mr. Pitt may not have acted willfully but merely negligently.

[29] The practice of "soft money fundraising" may often result in "undue influence" on lawmakers in Congress. Fred Wertheimer & Alexandra T.V. Edsall, *Response to Voting With Dollars: A New Paradigm For Campaign Finance,* 37 U. Rich. L. Rev. 1111, 1138 (2003). In the November 2000 federal elections, the Association of Trial Lawyers of America (ATLA) was the largest single campaign contributor of all legal groups, donating $3,632,450 to the candidates. Jeffrey O'Connell & Patrick B. Bryan, *More Hippocrates, Less Hypocrisy: "Early Offers" As a Means of Implementing the Institute of Medicine's Recommendations on Malpractice Law,* 15 J.L. & Health 23, 43 (2000-2001). Of these contributions by ATLA, ninety percent went to Democrats. *Id.* Such contributions may have the effect of shaping legislation supported by these Democrats in ways that benefit the plaintiffs' bar, *see* Wertheimer & Edsall, *supra*, at 1138, and of stalling legislation that would otherwise be enacted, Senator John McCain, *Introduction: Symposium on Campaign Finance Reform,* 34 Ariz. St. L.J. 1017, 1019 (2002). Historically, the plaintiffs' securities law bar has been a large source of political contributions to congressional Democrats, Edward A. Fallone, *Section 10(b) and the Vagaries of Federal Common Law: The Merits of Codifying the Private Cause of Action Under a Structuralist Approach*, 1997 U. Ill. L. Rev. 71, 78, and has been viewed as an ally of the SEC, Donald C. Langevoort, *Seeking Sunlight in Sante Fe's Shadow: The SEC's Pursuit of Managerial Accountability*, 79 Wash. U. L.Q. 449, 478 (2001), which has generally favored an expansive role for private litigation in the enforcement of the federal securities laws, Fallone, *supra*, at 79. Some commentators have argued that this link has contributed to a lack of reform of the federal securities laws. *Id.* at 78. As a result, the securities industry has favored Republican-backed reform measures, such as the Private Securities Litigation Reform Act (PLSRA), in an attempt to roll back the private cause of action under Rule 10b-5. *See id.* at 79.

rules that regulated payment for order flow in 1995,[30] even though the SEC itself had raised concerns about payment for order flow as early as 1989.[31]

II. THE *PRESS* CASE

In a case involving alleged noncompliance with Rule 10b-10 and alleged material nondisclosures under section 10(b) and Rule 10b-5, the Second Circuit used language that arguably supports the proposition that compliance with an applicable SEC disclosure rule renders any nondisclosure immaterial as a matter of law. Although this startling conclusion is one that even the SEC itself has rejected, it has already appeared in at least one trial court opinion.

The *Press* case[32] arose from two separate appeals from dismissals of two class actions on motions to dismiss, both of which were decided by Judge Patterson of the Southern District of New York: the *Press* class action[33] and the *Strougo* class action.[34] Both cases involved allegations that the defendant brokers[35] were sweeping customer cash account balances into money market funds[36] that the customers paid the defen-

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[30] *See* Francis J. Facciolo & Richard L. Stone, *Avoiding the Inevitable: The Continuing Viability of State Law Claims in the Face of Primary Jurisdiction and Preemption Challenges under the Securities Exchange Act of 1934,* 1995 COLUM. BUS. L. REV. 525, 648–64.

[31] *Id.* at 644 n.387.

[32] Press v. Quick & Reilly, Inc., 218 F.3d 121 (2d Cir. 2000).

[33] Press v. Quick & Reilly, No. 95 CIV 4278 (RPP), 1997 WL 458666 (S.D.N.Y. Aug. 11, 1997).

[34] Strougo v. Bear Stearns & Co., Inc., No. 95 CIV 6532 (RPP), 1997 WL 458667 (S.D.N.Y. Aug. 11, 1997) [hereinafter *Strougo III*]. There were two earlier decisions in *Strougo*, both dismissing earlier versions of the complaint on motions to dismiss. Strougo v. Bear Stearns & Co., Inc., No. 95 CIV 6532 (RPP), 1996 WL 648913 (S.D.N.Y. Nov. 7, 1996) [hereinafter *Strougo II*]; Strougo v. Bear Stearns & Co., Inc., No. 95 CIV 6532 (RPP), 1996 WL 67730 (S.N.D.Y Feb. 16, 1996) [hereinafter *Strougo I*]. Both of these earlier cases were dismissed because the plaintiffs did not "provide the particularized facts necessary to meet [Federal Rule of Civil Procedure] 9(b) pleading requirements." *Strougo II*, 1996 WL 648913, at *2; *Strougo I*, 1996 WL 67730, at *2.

[35] The *Strougo* and *Press* cases differed factually in that, in *Press,* the plaintiff's account was with an introducing broker that cleared through an affiliate. Memorandum of Law in Support of Defendants' Motion to Dismiss the Amended Class Action Complaint Pursuant to Rules 12(b)(6), 9(b) and 12(b)(1) of the Federal Rules of Civil Procedure at 4-5, Press v. Quick and Reilly, 1997 WL 458666 (S.D.N.Y. Aug. 11, 1997) (No. 96 CIV 4278 (RRP)) [hereinafter *Press*

Defendants' Memorandum of Law]. The third defendant was the alleged parent of both the introducing and clearing broker-dealer defendants. *Press*, 218 F.3d at 123 n.1. In *Strougo* the plaintiffs' accounts were with broker-dealers that cleared for themselves. *Id.*

"The securities brokerage industry is divided into those brokers who process their own trades and those brokers who use other firms to process their trades. The latter group, called 'introducing brokers,' send their customers' trade orders to 'clearing brokers,' who then make the actual trades." John M. Bellwoar, Note, *Bar Baron at the Gate: An Argument for Expanding the Liability of Securities Clearing Brokers for the Fraud of Introducing Brokers*, 74 N.Y.U. L. Rev. 1014, 1014 (1999). *See generally* Henry F. Minnerop, *The Role and Regulation of Clearing Brokers,* 48 BUS. LAW. 841, 841 (1993) (clearing firms' "services include the maintenance of books and records; the receipt, custody, and delivery of customer securities and funds; the extension of credit to finance customer transactions in margin accounts; and in many cases, the execution of transactions on exchanges or on the over-the-counter markets. Most important, clearing firms 'clear' transactions—paying for securities purchased and delivering securities sold in the accounts introduced to them pursuant to clearing agreements."). Although there are significant differences between the potential liabilities of an introducing broker and its clearing broker to the introducing broker's customers, these differences seem to have played no role in *Press*. *See generally* William J. Fitzpatrick & Ronald T. Carman, *An Analysis of the Business and Legal Relationship Between Introducing and Carrying Brokers*, 40 BUS. LAW. 47 (1984) (discussing the relationship and agreements between introducing and clearing firms, analyzing the relationship between a customer and his/her introducing broker and between the introducing broker and its clearing broker and outlining the laws governing these relationships).

[36] In the *Press* case, the plaintiffs alleged that "[d]uring the times that monies in the customer's account are not otherwise invested, defendants invest[ed] the monies in money market funds using automatic procedures known in the brokerage industry as 'automatic sweeps.'" Amended Class Action Complaint at 4, ¶ 11, *Press* (96 CIV 4278 (RPP)) [hereinafter *Press* Amended Class Action Complaint]. Similarly in the *Strougo* complaint, the plaintiffs alleged that "[d]uring the times that the customers' cash is not invested in securities, securities brokerage firms . . . through automatic procedures, invest this cash in money market funds, which pay interest on the cash." Class Action Complaint at 6, ¶ 7, Strougo v. Bear Steams & Co., Inc., 1996 WL 67730 (S.D.N.Y. Feb. 16, 1996) (No. 95 CIV 6532 (RPP)) [hereinafter *Strougo* Class Action Complaint.]

Some broker-dealers have begun sweeping customer funds into deposit accounts at banks owned by the broker-dealers. Tom Lauricella, *Brokerage Firms Stop Money-Fund "Sweeps"*, WALL ST. J., May 1, 2002, at C1. This allows the broker-dealer's bank affiliate to invest or loan these balances, making a considerably higher rate of return than the fees that a broker-dealer's affiliated money market fund can. *Id.*

> For many account holders, switching to bank accounts means lower returns on their idle cash, although in the current, extremely low-rate environment, customers may not notice much of a difference. But if history is

dant brokers a fee for using.[37] In addition, both cases involved allegations that the money market funds were among the worst performers in their industry, and that the brokers chose the funds solely because of the fees.[38] The plaintiffs were purchasing securities pursuant to this sweep feature because a money market fund is a type of mutual fund that issues securities that are designed to maintain a net asset value of one dollar.[39]

In both cases, the plaintiffs alleged that the failure of the brokers to disclose the receipt of the fees, which were characterized variously as "disguised commissions"[40] and kick-

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> a guide, the gap between money-market rates and bank-account interest rates will become much more apparent as rates go higher.

Id.

[37] Allegations in the *Press* case stated that the money market funds into which customers' money was swept by the defendants paid "so-called 12b-1 fees to its advisor" and that most of those fees "are paid by the Advisors to broker-dealers . . . for their distribution assistance." *Press* Amended Class Action Complaint, *supra* note 36, at 5. The allegations explain that neither the identity of the broker to which fees are paid nor the amount of those fees is included in the money market fund's prospectuses, resulting in non-disclosure of such fees to the customers. *Id.* at 6. The *Strougo* complaint alleges in a similar manner that the defendants "engaged in a pattern of conduct designed to enrich themselves at the expense of plaintiffs" by receiving cash payments and "kickbacks based upon the total dollar amount of monies swept into . . . money market funds." *Strougo* Class Action Complaint, *supra* note 36, at 7, ¶ 12. The complaint further alleges that "[t]he amount of the kickbacks made to and retained by defendants in exchange for directing the customers cash to a particular money market fund is not disclosed to defendants' customers." *Id.* at 8.

[38] The plaintiffs alleged in the *Press* case that "[t]he Funds are among the poorest performers among comparable money market funds" and asserted that the Funds with the poorest return to customers were those with the highest expenses. *Press* Amended Class Action Complaint, *supra* note 36, at 7-8. Based on the Funds' historically poor performance, the plaintiffs alleged that there was "no basis for defendants to choose the Funds for their customers other than the Fees that Alliance pays to defendants." *Id.* at 8. In the *Strougo* case, the plaintiffs alleged that different money market funds have different interest rate performances and the "Defendants do not advise plaintiffs . . . that certain money market funds have interest rate performances which are superior to those of the fund into which they sweep customer funds." *Strougo* Class Action Complaint, *supra* note 36, at 6-7, § 9-10.

[39] *See* American Bar Association, *Fund Director's Guidebook*, 52 BUS. LAW. 229, 266 (1996) ("Money market funds . . . are open-end investment companies that invest in short-term money market instruments and offer investors relative safety of principal, a high degree of liquidity, a wide range of shareholder services . . . , and maintenance of a stable net asset value (usually $1.00 per share).").

[40] *Press* Amended Class Action Complaint, *supra* note 36, at 8, ¶ 32.

backs,"[41] was a violation of Rule 10b-10,[42] section 10(b)[43]

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[41] *Strougo* Class Action Complaint, *supra* note 36, at 7, ¶ 12.

[42] The specific subsection of Rule 10b-10 involved in the *Press* and *Strougo* cases was Rule 10b-10(a)(2)(i)(D), which provides:

> PRELIMINARY NOTE. This section requires broker-dealers to disclose specified information in writing to customers at or before completion of a transaction. The requirements under this section that particular information be disclosed is not determinative of a broker-dealer's obligation under the general antifraud provisions of the federal securities laws to disclose additional information to a customer at the time of the customer's investment decision.
>
> (a) *Disclosure Requirement.* It shall be unlawful for any broker or dealer to effect for or with an account of a customer any transaction in, or to induce the purchase or sale by such customer of, any security (other than U.S. Savings Bonds or municipal securities) unless such broker or dealer, at or before completion of such transaction, gives or sends to such customer written notification disclosing:
>
> . . .
>
> (2) Whether the broker or dealer is acting as agent for such customer, as agent for some other person, as agent for both such customer and some other person, or as principal for its own account; and if the broker or dealer is acting as principal, whether it is a market maker in the security (other than by reason of acting as a block positioner); and
>
> (i) If the broker or dealer is acting as agent for such customer, for some other person, or for both such customer and some other person:
>
> . . .
>
> (D) The source and amount of any other remuneration received or to be received by the broker in connection with the transaction: *Provided, however,* that if, in the case of a purchase, the broker was not participating in a distribution, or in the case of a sale, was not participating in a tender offer, the written notification may state whether any other remuneration has been or will be received and the fact that the source and amount of such other remuneration will be furnished upon written request of such customer . . . .

17 C.F.R. § 240.10b-10 (a)(2)(i)(D) (2003).

[43] Section 10(b) provides that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange-
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> . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protec-

and Rule 10b-5.[44] The plaintiffs alleged that the payment of the fees to the defendant brokers created a conflict of interest between the brokers' economic interest in receipt of the fees and the plaintiffs' interest in receiving the highest possible returns on their money market securities.[45] The plaintiffs were not objecting to the receipt of the fees by the brokers; rather, they were objecting to the nondisclosure of the receipt.[46]

Although the plaintiffs, especially in the *Strougo* litigation, were not always clear about the distinction,[47] it is important

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tion of investors.

15 U.S.C. § 78j (2001).

[44] Rule 10b-5 provides that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

[45] *Press* Amended Class Action Complaint, *supra* note 36, at 13 (alleging the defendants' receipt of the Fees were "in furtherance of their own interest . . . and contrary to the interests of their customers"); *Strougo* Class Action Complaint, *supra* note 36, at 10, ¶ 25 (alleging "concealed kickbacks tend to induce defendants to sacrifice the best interest rates for their customers by inducing defendants to utilize the services of the money market fund that pays them . . . the most money").

[46] Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss Amended Complaint at 26, *Press* (No. 96 CIV 4278 (RPP)) [hereinafter *Press* Plaintiff's Memorandum of Law]; Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Amended Complaint at 5–6, *Strougo* (No. 95 CIV 6532 (RPP)) [hereinafter *Strougo* Plaintiffs' Amended Complaint Memorandum of Law].

[47] The *Press* Plaintiff's Memorandum of Law explicitly argued that "[a]part from rule 10b-10, Quick & Reilly's failure to disclose the fees it receives from Alliance violates § 10(b) and rule 10b-5." *Press* Plaintiff's Memorandum of Law, *supra* note 46, at 15. The *Strougo* plaintiffs' pleadings initially treated the alleged Rule 10b-10 and 10b-5 violations as if they were a single allegation. *See, e.g.*, *Strougo* Plaintiffs' Amended Complaint Memorandum of Law, *supra* note 46, at 4-5. The *Strougo* Plaintiffs' Memorandum of Law with respect to the Second

for the reader to distinguish between the two federal claims.[48] The Rule 10b-10 claim was that the brokers had not met the reporting requirements of subsection (a)(2)(i)(D).[49] The Rule 10b-5 claim was that, even if the brokers were in compliance with Rule 10b-10, the required disclosure that was made was inadequate to disclose the conflict of interest.[50]

Amended Complaint is almost identical to the *Press* Plaintiffs' Memorandum of Law, even including almost identical language to that just quoted from the *Press* Plaintiff's Memorandum of Law. *See* Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss Second Amended Complaint at 13, *Strougo* (No. 95 CIV 6532 (RRP)) [hereinafter *Strougo* Plaintiffs' Second Amended Complaint Memorandum of Law] ("Apart from rule 10b-10, defendants' failure to disclose the fees they receive from Alliance and Fidelity violates § 10(b) and rule 10b-5.").

Even the plaintiffs' pleadings in *Press* and the *Strougo* plaintiffs' final trial level pleadings are not as clear as they should be in distinguishing the alleged Rule 10b-10 violation from the Rule 10b-5 violation. *See Press* Plaintiff's Memorandum of Law, *supra* note 46, at 33-34 n.19 (stating, presumably in order to avoid a preemption argument concerning the state law claims, that "plaintiff here does not seek greater or different disclosure than that required by the SEC in this circumstance"); *accord Strougo* Plaintiffs' Second Amended Complaint Memorandum of Law, *supra*, at 29 n.13; *see also* Brief of the Securities and Exchange Commission, Amicus Curiae, in Response to the Court's Request at 9, Press v. Quick & Reilly, Inc., 218 F.3d 121 (2d Cir. 2000) (No. 97-9153) [hereinafter SEC *Press* Brief] ("The parties have focused on the requirements of Rule 10b-10, though this case is brought under Rule 10b-5, and in our view Rule 10b-10 is only collaterally relevant to the outcome of the case."). The SEC submitted identical briefs for both the *Press* and the *Strougo* cases, *id.* at 1; therefore, this Article will cite only to the *Press* brief.

[48] The plaintiffs also brought claims under New York state law for fraud, breach of fiduciary duty and unjust enrichment. *Press* Amended Class Action Complaint, *supra* note 36, at 14-18; *Strougo* Class Action Complaint, *supra* note 36, at 14-17.

[49] The plaintiffs in the *Press* case alleged that Rule 10b-10 "requires that broker-dealers make at least monthly written disclosure to their customer of any remuneration payable to the broker-dealer for executing sweeps into money market funds." *Press* Amended Class Action Complaint, *supra* note 36, at 11. In failing to disclose such remuneration, the defendants, it was alleged, failed to comply with Rule 10b-10. *Id.* at 13. Similarly, in the *Strougo* case, the plaintiffs alleged that failure to disclose "timely and complete information" regarding matters relating to the fees received through the money market funds was a violation of 10b-10. *Strougo* Class Action Complaint, *supra* note 36, at 12-13.

[50] In the *Press* case, the plaintiffs alleged that "Rule 10b-5 . . . requires brokers to disclose any financial interest that a broker has in a trade that it executes on behalf of a customer and to report to the customer any information about a broker's conflicting interest." *Press* Amended Class Action Complaint, *supra* note 36, at 12. "Defendants' failure to disclose their own financial and economic incentives in connection with the purchase of money market securities"

The Second Circuit requested the SEC to "submit an *amicus curiae* brief expressing the Commission's views 'on the issues set forth in the [parties'] briefs,' specifically 'the distribution and advisory fee disclosure requirements' under Rule 10b-10."[51] In the briefs that it submitted, the SEC made very clear that it was presenting its views only on Rule 10b-10[52] and that, even if the disclosure requirements of Rule 10b-10 had been met, this fact "does not necessarily mean that there has been no violation of Rule 10b-5."[53] As the SEC formulated the issue,

> the existence of the payments [to the brokers] and some information about them was disclosed in the prospectuses [of the relevant money market funds], so the issue is whether the difference between the information that was disclosed and the greater information that plaintiffs claim should have been disclosed is material.[54]

The Second Circuit adopted the SEC's articulation of the issues, first looking at whether Rule 10b-10 had been violated[55] and then whether Rule 10b-5 required additional disclosure.[56] On the first issue, the Second Circuit, deferring to the SEC's interpretation of Rule 10b-10,[57] held that the brokers had complied with the reporting requirements of the rule.[58]

Even in arriving at this holding, the Second Circuit signaled its discomfort with the adequacy of the disclosure made by the brokers with regard to the payments they allegedly received.[59] It was willing, however, to defer to the SEC's deter-

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constituted, according to the plaintiffs, a violation of Rule 10b-5. *Id.* at 13.

[51] Press v. Quick & Reilly, Inc., 218 F.3d 121, 126 (2d Cir. 2000).

[52] SEC *Press* Brief, *supra* note 47, at 1.

[53] *Id.* at 28.

[54] *Id.* at 29.

[55] *Press*, 218 F.3d at 128–29.

[56] *Id.* at 129–132.

[57] *Id.* at 128.

[58] *Id.* at 129.

[59] *Id.* The language that the Second Circuit used is instructive:

> Finally, although we are skeptical that the disclosures in the prospectuses and SAIs, *i.e.*, general statements that payments were made by the funds and their advisers to broker-dealers for their assistance, would actually alert an investor that *his* broker-dealer received such payments, we can-

mination that an investor "might" be able to "piece together" disclosures contained in several different filings required by the federal securities laws and arrive at the conclusion "that his broker-dealer receives fees from that money-market fund."[60]

On the second issue involving Rule 10b-5, the Second Circuit's discomfort with its holding was evident in the language and caveats that it used: "[o]ur holding . . . is not entirely free of tension;"[61] "[d]espite these considerations favoring a finding of materially here, we believe such a finding would supplant the SEC's determination of what is material with our own;"[62] and "[a]lthough we are not ourselves certain that the disclosure requirements of Rule 10b-10 fulfill its stated purpose, we defer to the SEC's interpretation . . . . "[63] Nonetheless, the Second Circuit held that the allegedly omitted information was "not, as a matter of law, material under Rule 10b-5"[64] because to hold otherwise would "undermine the SEC's interpretation of its regulation [Rule 10b-10] by requiring even greater disclosure."[65]

The extreme deference shown by the Second Circuit to the SEC is both puzzling and disturbing. It is puzzling because determining what violates section 10(b) and Rule 10b-5 is a role with which the courts have traditionally been comfortable. Indeed, the private right of action under Rule 10b-5 is, itself, a judicial creation.[66] Why should the *Press* case be any different? It is disturbing because, read at its broadest, *Press* immunizes from challenge under Rule 10b-5 any disclosure or non-disclo-

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> not say that the SEC's determination that Rule 10b-10 may be satisfied by these types of disclosures is plainly erroneous.

Id.

[60] *Id.*

[61] *Id.* at 130.

[62] *Id.* at 131.

[63] *Id.* at 132. The Second Circuit even acknowledged that the SEC itself had doubts that the "current disclosure requirements of Rule 10b-10" met "their intended purpose." *Id.* at 132 n.13.

[64] *Id.* at 132.

[65] *Id.* at 131.

[66] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975) ("When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn.").

sure made in conformity with SEC regulations.[67] No explicit justification was given by the Second Circuit for this deferral to the SEC. The underlying motivation for this result seems to be a concern not to intrude into the area of securities regulation, but rather to leave it to the expertise of the SEC.[68] Indeed this narrow approach to the appropriate role of the courts in securities regulation is consistent with the attitude of the Supreme Court,[69] which for almost thirty years has evinced hostility to the very idea of a private cause of action for a violation of section 10(b) and Rule 10b-5.[70] The Second Circuit articulated no overarching jurisprudential theory to justify its result, although at first blush it might appear that the court was applying either *Chevron* deference to an agency's interpretation of a statute that the agency is charged with administering (section 10(b));[71] *Seminole Rock* deference to an agency's interpretation

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[67] *See* Demaria v. Andersen, 153 F. Supp. 2d 300, 311 (S.D.N.Y. 2001) (citing, in a case involving a non-disclosure in a registration statement of the issuer's most recent quarterly results, to *Press* in dictum for the proposition that SEC regulations determine what information is material).

[68] *Press*, 218 F.3d at 132 ("[W]e defer to the SEC's interpretation of its rule and leave it to the governmental entity best suited to sort out any inadequacies of the current disclosure regime.").

A similar type of judicial deference has appeared in the area of injunctive actions involving securities filings that have been reviewed by the SEC, most particularly in the area of proxy filings. S. Coast Servs. Corp. v. Santa Ana Valley Irr. Co., 669 F.2d 1265, 1270-71 (9th Cir. 1982); Gen. Tire Corp. v. Talley Industries, Inc., 403 F.2d 159, 163 (2d Cir. 1968); Pabst Brewing Co. v. Jacobs, 549 F. Supp. 1068, 1076 (D. Del. 1982), *aff'd*, 707 F.2d 1394 (3d Cir. 1982); Armour & Co. v. Gen. Host Corp., 296 F. Supp. 470, 475 (S.D.N.Y. 1969) (involving alleged deficiencies in a registration statement covering an exchange offer); Sherman v. Posner, 266 F. Supp. 871, 874 (S.D.N.Y. 1966); Kauder v. United Bd. & Carton Corp., 199 F. Supp. 420, 423-24 (S.D.N.Y. 1961); Mack v. Mishkin, 172 F. Supp. 885, 887 (S.D.N.Y. 1959); Dunn v. Decca Records, Inc., 120 F. Supp. 1, 2 (S.D.N.Y. 1954). *But see* Gillette Co. v. RB Partners, 693 F. Supp. 1266, 1287 (D. Mass. 1988) ("Generally speaking, the cases say that courts have refused to accord weight to clearance of proxy materials by the SEC."). In part, courts in these cases have relied on the fact that the SEC either knew or must have known of the omission of certain facts in proxy statements because of its review process and did not take any action against the defendants in order to support holdings that the omission could not support preliminary injunctions against the solicitation of proxies. *See, e.g., Kauder*, 199 F. Supp. at 423-24 ("Presumably, the material set forth in the proxy statement was submitted to the staff of the Commission for prior approval . . . I feel that in an area where the primary power of protection of investors is rested in the Commission, their failure to take a stronger position is of some weight, particularly on a motion of this sort for preliminary relief."). The courts have come to this conclusion despite the language of Rule 14a-9(b). *See, e.g., Gen. Tire Corp.*, 403 F.2d at 163. Rule 14a-9(b) specifically provides that

> [t]he fact that a proxy statement . . . has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not fake or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders.

17 C.F.R. § 240.14a-9(b) (2003). The analogy to the forward to Rule 10b-10, see *infra* note 150, is obvious.

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[69] The Supreme Court has evinced its attitudes in a variety of cases involving section 10(b) as well as other sections of the federal securities laws. *See* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 165 (1994) (referring to the "uncertainty" and "excessive litigation" of section 10(b) actions); Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1096 (1991) (stating that recognizing plaintiff's causation theory under section 14(a) of the 1934 Act "would threaten just the sort of strike suits and attrition by discovery that *Blue Chip Stamps* sought to discourage"); Marine Bank v. Weaver, 455 U.S. 551, 556 (1982) ("Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud."); Blue Chip Stamps v. Manor Drug Store, 421 U.S. 723, 739 (1975) ("[L]itigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.").

[70] *See generally* Bhavik R. Patel, *Securities Regulation—Fraud—Rule 10b-5 No Longer Scares the Judiciary, but May Scare Corporate Defendants: The United States Supreme Court Switches Directions*, 25 U. ARK. LITTLE ROCK L. REV. 191, 200–01 (2002) (describing Supreme Court as generally embracing "a restrictive view of Rule 10b-5's reach" and as limiting "much of Rule 10b-5's potency"); *cf. Blue Chip Stamps*, 421 U.S. at 737.

[71] 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.2 (3d ed. 1994). *Chevron* deference refers to the judicial standard advanced by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–44 (1984), where the Court introduced a two-step inquiry regarding an agency-administered statute. *Id.* If Congress has spoken explicitly on an issue, then the courts are to apply the intent of the legislature. *Id.* If Congress has not spoken, then the courts defer to the interpretation of the agency administering the statute, provided such interpretation is reasonable. *Id.*

The role of *Chevron* has been rendered unclear by *United States v. Mead Corp.*, 533 U.S. 218 (2001), which has been read as either supplanting *Chevron*, *Mead Corp.*, 533 U.S. at 239 (Scalia, J., dissenting), or as a preliminary test "to determine whether a court should apply the *Skidmore* or *Chevron* deference test to a regulation," Derek P. Langhauser, *Executive Regulations and Agency Interpretations: Binding Law or Mere Guidance? Developments in Federal Judicial Review*, 29 J.C. & U.L. 1, 18 (2002). In Mr. Langhauser's view, *Mead* has "redefine[d] the first prong of the *Chevron* test—evidence of congressional intent to make rules—and replace[d] it with a new standard – evidence of congressional of its own regulations (Rules 10b-10 and 10b-5);[72] or the doctrine of primary jurisdiction.[73] Certainly *Seminole Rock* deference, which is briefly discussed in Part II.A., is implicated in the Second Circuit's discussion of Rule 10b-10. But *Chevron* deference should play no role in the *Press* case in light of the SEC's clearly stated position in its amicus brief that it had not, in promulgating Rule 10b-10, spoken and was not now speaking to the section 10(b) issue.[74] Indeed, the practical result in *Press* resembles that which would occur through application of the primary jurisdiction doctrine.[75]

The application of the primary jurisdiction doctrine to securities litigation has been criticized by the Author because the active role that the SEC plays in litigation through the amicus curiae process obviates the need to get the agency's

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intent to make rules '*with the force of law.*'" *Id.* at 18 (quoting *Chevron*, 533 U.S. at 242) (alteration in original). If this new standard is not met, then the "power to persuade" test of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), is applied to the rule or regulation. Langhowser, *supra*, at 18. If this new standard is met, then the issue becomes "whether the agency has acted within the scope of its delegated authority." *Id.* (citing *Mead*, 533 U.S. at 227.)

[72] *See generally* 1 DAVIS & PIERCE, *supra* note 71, at § 6.10. *Seminole Rock* deference refers to the judicial standard advanced by the Supreme Court in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), applied when the court must review an administrative agency's interpretation of its own regulation. *Seminole Rock*, 325 U.S. at 413-14. The Court held that an administrative agency's interpretation of its own regulation is "controlling . . . unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414.

[73] 2 DAVID & PIERCE, *supra* note 71, § 14.1.

[74] *See supra* text accompanying notes 71-72.

[75] Primary jurisdiction is a judicially created doctrine pursuant to which a court may elect to defer consideration of a complex case pending disposition of a salient issue in that case by the appropriate administrative or regulatory body. The result is not to remove the courts totally from the process but rather to allocate the initial decision to an agency, subject to subsequent judicial review. The doctrine of primary jurisdiction is applied by a court to temporarily stay proceedings in cases where there is a precise legal issue that can be effectively addressed by the agency and a prescribed method exists for the agency to address the issue. *See* 2 DAVIS & PIERCE, *supra* note 71, at § 14.1. Primary jurisdiction arises in securities litigation when allegedly complicated securities practices regulated by the SEC are subject to judicial scrutiny. The doctrine of primary jurisdiction is, of course, closely related to that of exhaustion of remedies. The main difference is that, in the typical exhaustion case, the administrative agency's adjudicatory function has been invoked, i.e., the agency had been given authority to actually adjudicate the issue. A limited number of statutes, of which the Exchange Act is not one, have a section providing for primary jurisdiction. *Id.*

position prior to judicial review.[76] The *Press* case is a perfect example of the amicus curiae process in action. The SEC supplied a fully developed and well reasoned brief concerning its position on what disclosure was required by Rule 10b-10 and whether the defendant brokers had met the requirements.[77] The Second Circuit relied heavily on this brief in holding that there had been no violation of Rule 10b-10.[78]

The Second Circuit went a step further than the traditional primary jurisdiction doctrine and, after adopting the SEC's position on Rule 10b-10, held that there was no appropriate subject for judicial review. A detailed examination of the Rule 10b-10 issues raised in *Press* shows that an analysis of the Rule 10b-10 issues should not have substituted for an analysis of the Rule 10b-5 issues.

A. *Rule 10b-10*

Since the original promulgation in 1937 of the predecessor to Rule 10b-10, the SEC has steadily increased the amount and type of disclosure that must be made by a broker-dealer to its customers in connection with transactions in securities. What is now Rule 10b-10 was originally promulgated by the SEC in 1937, under the authority of section 10(b) of the 1934 Act, as Rule MC4 and required the written disclosure by "a broker or a dealer" of, among other things, "the source and amount of any commission or other remuneration received or to be received by him in connection with [a] transaction" involving that customer's account.[79] In 1938, Rule MC4 was readopted and renumbered as Rule 15c1-4 without any change in the operative language.[80] The rule remained substantially unchanged until 1976 when it was expanded to require bank municipal securities dealers to make the described disclosures as well.[81]

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[76] Facciolo & Stone, *supra* note 30, at 628–39.

[77] SEC *Press* Brief, *supra* note 47.

[78] Press v. Quick & Reilly, Inc., 218 F.3d 121, 126-28 (2d Cir. 2000).

[79] Exchange Act Release No. 34-1330, 2 Fed. Reg. 1389, 1390 (August 10, 1937).

[80] *See* Re-Adoption of Rules, Exchange Act Release No. 34-1763, 3 Fed. Reg. 1613, 1613 (July 1, 1938).

[81] *See* Regulation of Municipal Securities Professionals, Exchange Act Release

In 1977, Rule 10b-10 was adopted in place of Rule 15c1-4 in order to modernize the regulations in accordance with industry developments and innovations.[82] The principal change in the regulation was that, whereas Rule 15c1-4 only applied to "brokers and dealers effecting transactions otherwise than on a national securities exchange," Rule 10b-10 would "apply regardless of the manner in which a broker-dealer conducts its business or the marketplace where transactions are effected."[83] In 1978, Rule 10b-10 was amended to further expand the disclosure requirements.[84] Similarly, in 1985 the rule was expanded to require still greater disclosure by broker-dealers.[85] Again, in 1994, Rule 10b-10 was amended to require disclosure with respect to additional markets and types of securities.[86]

The trend of the SEC's continual expansion of the disclosure requirements in order to protect investors from fraudulent practices is reflected in the two No-Action letters that were so important in the *Press* litigation. In 1994, the SEC considered withdrawing a 1979 No-Action letter[87] that permitted broker-

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No. 34-12,468, 41 Fed. Reg. 22,820, 22,820 (June 7, 1976) ("The effect of the proposed amendments would be to prohibit municipal securities dealers from engaging in manipulative acts and practices . . . .").

[82] *See* Securities Confirmations, Exchange Act Release No. 34-13,508, 42 Fed. Reg. 25,318, 25,318-19 (May 17, 1977).

[83] *Id.* at 25,319.

[84] *See* Securities Confirmations, Exchange Act Release No. 34-15,219, 43 Fed. Reg. 47,495, 47,495 (October 16, 1978) ("Under the new requirements, brokers and dealers must make disclosures relating to odd-lot differentials, remuneration received in certain principal transactions, and market making activities.").

[85] *See* Confirmation Disclosure for Reported Securities, Exchange Act Release No. 34-22,397, 50 Fed. Reg. 37,648, 37,648 (Sept. 17, 1985) ("The Commission is adopting amendments to its rule governing customer confirmation disclosure to require more complete disclosure for principal transactions in reported securities.").

[86] *See* Confirmation of Transactions, Exchange Act Release No. 34-34,962, 59 Fed. Reg. 59,612, 59,612 (Nov. 17, 1994) ("Consistent with the Commission's investor protection mandate and in keeping with innovations in securities products and markets, the amendments will require brokers and dealers to provide information concerning customer transaction costs in specified NASDAQ and exchange-listed securities, the status of certain unrated debt securities, the status of certain non-SIPC member broker-dealers, and the availability of information regarding asset-backed securities.").

[87] Investment Company Institute, SEC No-Action Letter, [1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,041 at 81,654 (Apr. 18, 1979). See *infra* notes

dealers to disclose commissions charged to the customer in a prospectus as opposed to an immediate confirmation.[88] Although the SEC has not withdrawn the 1979 No-Action letter, its tendency to expand rather than limit disclosure requirements was revealed when it stated, "[w]e no longer believe that non-disclosure of commissions on investment company transactions is appropriate . . . . We believe that all relevant aspects of transactions in investment company shares should be made clear . . . ."[89]

The *Press* Complaint asserted that Rule 10b-10 required "that broker-dealers make at least monthly written disclosure to their customers of any remuneration payable to the broker-dealer for executing sweeps into money market funds."[90] Next, the complaint alleged that Rule 10b-10 imposed an obligation of disclosure on the defendants and that the defendants had failed to comply with this obligation.[91] The result of the defendants' failure to disclose their receipt of remuneration from the money market managers, in compliance with Rule 10b-10, was that "plaintiff and the members of the class, who would presume that defendants are complying with the law, would conclude that no such payments were being made."[92] In effect, the plaintiffs asserted that they relied on the defendants meeting their obligations under Rule 10b-10 while the defendants failed to do so. Similarly the *Strougo* Complaint asserted that the Rule 10b-10 disclosure requirements "are statutory minimum disclosure requirements"[93] and that the defendants' failure to comply with these minimum requirements constituted a violation of Rule 10b-5.[94]

The plaintiffs' allegations concerning the requirements of

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109 and 115 and accompanying text for a discussion of the 1979 No-Action Letter.

[88] Investment Company Institute, SEC No-Action Letter, 1994 WL 131068, at *1 (March 16, 1994).

[89] *Id.*

[90] *Press* Amended Class Action Complaint, *supra* note 36, at 11, ¶ 43.

[91] *Id.* at 12, ¶¶ 46, 48.

[92] *Id.* at 13, ¶ 49.

[93] Second Amended Class Action Complaint, at 8, ¶ 19, Strougo v. Bear Stearns & Co., Inc., 1997 WL 458667 (S.D.N.Y. Aug 11, 1997) (No. 95 CIV 6532 (RPP)) [hereinafter *Strougo* Second Amended Complaint].

[94] *Id.* at 23, ¶ 48.

Rule 10b-10 are further explained in their respective memoranda of law in opposition to the defendants' motions to dismiss.[95] Plaintiffs acknowledged that Rule 10b-10 permits the defendants to confirm transactions in money market securities through monthly or quarterly statements,[96] as opposed to specific confirmation after each and every transaction.[97] Nonetheless, the defendants were required to disclose, in their periodic transaction confirmation, "any remuneration received or to be received by the broker or dealer in connection therewith."[98] In effect, Plaintiffs simply asserted a "plain meaning" interpretation of Rule 10b-10. That is, the requirement that brokers disclose any remuneration received, or to be received in the future, in connection with transactions with the customer's account, means that *any* such remuneration must be disclosed regardless of how such remuneration is characterized.[99] Ultimately, the significance of Rule 10b-10 to the plaintiffs' case was that it created a presumption of materiality with respect to information about which it mandated disclosure.[100] Thus, the fact that any remuneration was received in connection with transactions on behalf of the customer's account was within the province of Rule 10b-5.

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[95] *Press* Plaintiff's Memorandum of Law, *supra* note 46, at 10. Hereinafter statements concerning the arguments of the various parties will only cite the *Press* pleadings. It is not necessary to cite to the *Strougo* pleadings because the allegations and arguments are identical to those put forth in the *Press* pleadings. Of course, where necessary the *Strougo* pleadings will be specifically cited, but unless otherwise noted the reader may assume that the *Strougo* pleadings contain the same or similar statements as those cited in the *Press* pleadings. For example, compare *Press* Plaintiff's Memorandum of Law, *supra* note 46, at 11 ("The rule could not be clearer that *any* remuneration the broker receives in connection with the purchase or sale of money market fund securities must be disclosed.") with *Strougo* Plaintiffs' Second Amended Complaint Memorandum of Law, *supra* note 47, at 9 ("The rule could not be clearer that *any* remuneration the broker receives in connection with the purchase or sale of money market fund securities must be disclosed.").

[96] *Press* Plaintiff's Memorandum of Law, *supra* note 46, at 10. The periodic confirmation under 10b-10(b) is permitted when the transactions "are effected pursuant to a periodic plan or an investment company plan, or effected in shares of any open-end management investment company . . . that holds itself out as a money market fund and attempts to maintain a stable net asset value per share . . . ." *Id.* at 10-11 (quoting 17 C.F.R. § 240.10b-10(b)(1) (1994)). The transactions at issue in the *Press* and *Strougo* cases were clearly within this periodic disclosure proviso. *See id.* at 11.

[97] *See Press* Plaintiff's Memorandum of Law, *supra* note 46, at 10 (citing 17 C.F.R. § 240.10b-10(a)).

[98] *Press* Plaintiff's Memorandum of Law , *supra* note 46, at 11 (quoting 17 C.F.R. § 240.10b-10(b)(2)).

[99] *See Press* Plaintiff's Memorandum of Law, *supra* note 46, at 11; *see also infra* notes 101-10 and accompanying text (concerning the defendants' alternative interpretation of Rule 10b-10).

The defendants, in their respective motions to dismiss, asserted an alternative interpretation of Rule 10b-10's applicability. The defendants made two principle arguments concerning Rule 10b-10. First, they argued that the rule simply did not apply in this case.[101] Defendants distinguished between transaction-based remuneration and asset-based remuneration.[102] The fees collected by the defendant brokers that were at issue were calculated as a percentage of the relevant money market fund's aggregate net assets over time.[103] That is, the size of the remuneration received by the defendants was not determined transaction by transaction.[104] The defendants then asserted that Rule 10b-10 mandated disclosure only of transaction-based fees received by the broker.[105] The defendants argued, therefore, that Rule 10b-10 placed them under no obligation to disclose the asset-based fees at issue.[106]

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[100] *Press* Plaintiff's Memorandum of Law, *supra* note 46, at 27 ("[I]nclusion of this information in the mandatory disclosure required under rule 10b-10 renders the information presumptively material."); *see also* Securities Confirmations, Exchange Act Release No. 34-13,508, 42 Fed. Reg. 25,318, 25,320 n.28 (May 17, 1997) ("Rule 10b-10 only mandates the disclosure of information which can generally be expected to be material."). For discussion of the SEC's interpretation of Rule 10b-10, see *infra* notes 112 and 114 and accompanying text.

[101] *See Press* Defendants' Memorandum of Law, *supra* note 35, at 7.

[102] *Id.* at 7-8.

[103] *Id.*; *see also Press* Amended Class Action Complaint, *supra* note 36, at 6, ¶ 21 (stating that the fees paid "are average aggregate percentages over the total value of each fund").

[104] *Press* Defendants' Memorandum of Law, *supra* note 35, at 7-8.

[105] *Id.* at 7. The crux of the defendants' argument was that Rule 10b-10 only requires disclosure of "remuneration received or to be received by the broker *in connection with the transaction.*" *See* 17 C.F.R. § 240.10b-10(a)(2)(i)(D) (2003) (emphasis added). Thus, since the fees at issue were not received at the time of, that is, in connection with a transaction, Rule 10b-10 did not apply. *See* Brief of Defendants-Appellees at 27-29, Press v. Quick & Reilly, Inc., 218 F.3d 121 (2d Cir. 2000) (No. 97-9135) [hereinafter Brief of *Press* Defendants-Appellees].

[106] *Press* Defendants' Memorandum of Law, *supra* note 35, at 8 ("[T]he fees of

Second, the defendants asserted that, even if Rule 10b-10 did apply, the required disclosures had been made.[107] The prospectuses sent directly to the plaintiffs by the money market funds disclosed that a certain percentage of each fund's aggregate assets were paid to each fund's adviser, who in turn passed "[s]ubstantially all" of these fees on to broker-dealers "for their distribution assistance."[108] In support of the position

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which plaintiff complains are not subject to the disclosure requirements of Rule 10b-10.").

[107] *Id.* Two types of payments were at issue. *See* Oral Argument, Joint Appendix at 392-93, Press v. Quick & Reilly, Inc., 218 F.3d 121 (2d Cir. 2000), No. 97-9159 (Apr. 15, 1997) [hereinafter *Press* Oral Argument]. The fees paid by a money market fund out of fund assets may be characterized as 12b-1 fees. These 12b-1 fees are perfectly acceptable so long as the fund managers comply with the relevant regulatory provisions. *See* 17 C.F.R. § 270.12b-1 (2003). The other fees at issue were referred to in the money market fund prospectuses as "significant amounts from the Advisor's own resources." *See Press* Amended Class Action Complaint, *supra* note 36, Ex. B at 7. The legitimacy of these non-12b-1 fees does not appear to have been raised by the plaintiffs. Rather, the complaint was concerned merely with the alleged failure to disclose the existence and amounts of these (and the 12b-1) fees. Defendants argued that a formula permitting the calculation of the 12b-1 fees was contained in the prospectus and therefore satisfied the Rule 10b-10 requirements as laid out in the SEC's 1979 No-Action letter. *See Press* Oral Argument, *supra* at 392-93. Defendants next argued that the amount of the non-12b-1 fees was disclosed in the annual and semiannual fund reports as well as in the Statement of Additional Information incorporated in the prospectuses by reference. *See id.* at 393; *see also Press* Amended Class Action Complaint, Ex. B, *supra* note 36, at 1.

In order to ensure effective disclosure of information to investors, the SEC adopted a two-part disclosure process in 1983. *See* Registration Form Used by Open-End Management Investment Companies, Release No. IC-22,528, 62 Fed. Reg. 10,898, 10,899 (March 10, 1997). This change was prompted by a concern that mutual fund prospectuses were too complex for many investors. *See* Registration Form Used by Open-End Management Investment Companies, Investment Company Act Release No. IC-12,927, 48 Fed. Reg. 813, 814 (Jan. 7, 1983). Therefore, a prospectus may be simple and concise, containing only "matters of fundamental importance" that would allow an investor to make an informed choice. *See id.* More extensive information is to be contained in a Statement of Additional Information (SAI). Registration Form Used by Open-End Management Investment Companies, 62 Fed. Reg. at 10,899. The SAI should contain more information pertaining to matters discussed in the prospectus, *id.* at 10,918, as well as information regarding other matters that are not required by all investors, but may be of interest to some, Registration Form Used by Open-End Management Investment Companies, 48 Fed. Reg. at 823. Furthermore, an investor must be notified that the SAI is available from the mutual fund, free of charge, at her request. *Id.* at 815.

[108] *Press* Amended Class Action Complaint, Ex. B., *supra* note 36, ; *see also*

that the disclosures contained in the fund prospectuses were sufficient under Rule 10b-10, the defendants relied upon the SEC's 1979 No-Action letter, which stated that additional disclosure would not be required so long as the prospectus provided either an exact dollar amount or a formula that could be used to calculate the exact dollar amount.[109] Finally, in a footnote, the defendants pointed out that "even if Rule 10b-10 were violated, the mere violation of Rule 10b-10 is not a *per se* violation of Section 10(b) or Rule 10b-5."[110]

Judge Patterson of the Southern District of New York summed up his impression of the plaintiffs' argument with respect to Rule 10b-10 in a sentence.[111] Judge Patterson stated that what the plaintiffs were "really saying [is] that [the defendants] have an obligation not just to disclose it in the prospectus but to disclose it in the customer statements that the customer receives."[112] Judge Patterson dismissed the defendants' argument that Rule 10b-10 did not apply because the fees were asset-based instead of transaction-based.[113] Instead, applying the "plain meaning" approach advocated by plaintiffs, Judge Paterson held that Rule 10b-10 applied because the fees, although calculated based on aggregate balances, were nonetheless received by the broker in connection with a transaction.[114] The trial court also held that the SEC's 1979 No-Action letter was controlling with respect to Rule 10b-10's disclosure requirements.[115] Thus, "the defendant's compliance

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Press Defendants' Memorandum of Law, *supra* note 35, at 8-9.

[109] *Press* Defendants' Memorandum of Law, *supra* note 35, at 8-9. Plaintiffs, in their reply briefs, argued that the 1979 No-Action letter did not apply because it had been written before Rule 10b-10 was amended in 1983 to permit the periodic confirmations at issue in the case. Thus, "[s]ection (b) of rule 10b-10 overrides the 1979 [No-Action] letter." *Press* Plaintiff's Memorandum of Law, *supra* note 46, at 12.

[110] *Press* Defendants' Memorandum of Law, *supra* note 35, at 9-10 n.7.

[111] The *Press* and *Strougo* cases appear to have been consolidated at this point for the purposes of oral argument.

[112] *Press* Oral Argument, *supra* note 107, at 390.

[113] Press v. Quick & Reilly, No. 96 CIV 4278 (RPP), 1997 WL 458666, at *3 (S.D.N.Y. Aug. 11, 1997) ("Rule 10b-10, however, does not require that the remuneration received must be calculated on a transactional basis, or in any other fashion, but only that it be 'in connection with the transaction.'").

[114] *Press*, 1997 WL 458666, at *3.

[115] *Id.* The court addressed the plaintiffs' argument that the SEC had an-

with the 1979 No-Action letter would be sufficient for the purposes of satisfying Rule 10b-10."[116] Moreover, "such compliance [with Rule 10b-10] as a matter of law would not support an inference of fraudulent intent in a securities fraud pleading."[117] The court went on to explain that the defendants' compliance with Rule 10b-10 depended on whether the prospectuses that had been furnished disclosed the "precise amount of the sales load or other charges or a formula that would enable the customer to calculate the precise amount of those fees."[118] Because neither the prospectuses nor the SAI[119] provided a formula that would permit the customer to estimate the

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nounced its intention to withdraw the 1979 No-Action letter by pointing out that the letter had never actually been withdrawn. *Id.*; *see also* Investment Company Institute, SEC No-Action Letter, 1994 WL 131068 (March 16, 1994). For a recent discussion of the no-action letter process, see Donna M. Nagy, *Judicial Reliance on Regulatory Interpretation in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921 (1998). Professor Nagy notes that "[t]hus far, no federal appellate court has directly confronted the issue of whether regulatory interpretations in no-action letters warrant the type of automatic deference prescribed in *Seminole Rock.*" *Id.* at 979. At the district court level, "[a]lthough most courts that have considered regulatory interpretations in no-action letters have deferred to that authority, a minority of courts have explicitly rejected no-action letter authority in favor of their own interpretation of the regulatory ambiguity at issue in the litigation." *Id.* at 985 (footnote omitted). Professor Nagy's recommendation is that courts should "never automatically defer to no-action letters in rendering decisions regarding the meaning of ambiguous regulatory provisions. Rather, courts should rely only on those regulatory interpretations in no-action letters that they find persuasive." *Id.* at 1013. In evaluating the persuasiveness of a particular no-action letter, Professor Nagy points to six factors that she believes a court should consider: whether the statute or rule to which the no-action letter is addressed is ambiguous; the quality of reasoning of the no-action letter; whether the Commission reviewed and approved the no-action letter which, as an initial matter, is a staff response; consistency of the interpretive position; SEC staff expertise in the area implicated by the no-action letter; and the reliance interests of securities industry participants, if any, on the positions stated in the no-action letter. *Id.* at 1003-12.

[116] *Press,* 1997 WL 458666, at *3.

[117] *Id.* Judge Patterson appears to have, in effect, adopted the plaintiffs' argument that Rule 10b-10's requirements do set a minimum standard for Rule 10b-5 claims; however, he applied it to the scienter element of fraud rather than the materiality element upon which plaintiffs focused. *Id.*

[118] *Id.* (quoting Investment Company Institute, SEC No-Action Letter, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,051 at 81,656 (Apr. 18, 1979)).

[119] See *supra* note 107 for a brief description of money market mutual fund prospectuses and SAIs.

amounts received by the broker, the defendants were not in complete compliance with the 1979 No-Action letter and had, therefore, violated Rule 10b-10.[120] Ultimately, however, the court held that the prospectuses and SAI provided enough information to negate any inference of fraudulent intent, and the claims were therefore dismissed.[121]

The Second Circuit asked the SEC to submit an amicus curiae brief discussing the disclosure requirements under Rule 10b-10 and adopted the SEC's position on what types of disclosure were mandated by the rule. The SEC explained that, when a broker-dealer accepts remuneration from a third party in connection with a customer's account, the broker-dealer is put in the position of representing the rights of parties who have conflicting interests.[122] This conflict creates "a potential for abuse" which must be disclosed to the customer.[123] The SEC dismissed the defendants' argument that Rule 10b-10 applied only to transaction-based fees.[124]

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[120] *Press*, 1997 WL 458666, at *4. The court's holding in the *Strougo* case was virtually identical to that in *Press*. *See* Strougo v. Bear Stearns & Co., Inc., No. 95 CIV 6532, 1997 WL 458667, at *5 (S.D.N.Y. Aug. 11, 1997).

[121] *Press*, 1997 WL 458666, at *5. On appeal to the Second Circuit, that court pointed out that a corollary to the district court's dismissal was the conclusion that a violation of Rule 10b-10 does not independently create a private cause of action. *See* Press v. Quick & Reilly, Inc., 218 F. 3d 121, 126 n.7 (2d Cir. 2000). The Second Circuit declined to reach this issue however because, as discussed *infra*, it concluded that Rule 10b-10 had not been violated. *Id.* A similar question regarding a private cause of action would appear to arise with respect to alleged violations of the National Association of Securities Dealer's Rules of Fair Practice concerning disclosure by broker-dealers of fees received in connection with a customer's account, but this issue is beyond the scope of this Article. *See* NASD MANUAL, Rule 2230, at 4213 (1990); *see also Press* Amended Class Action Complaint, *supra* note 36, at 12, ¶ 45.

[122] SEC *Press* Brief, *supra* note 47, at 14-15. Presumably the SEC was referring to the conflict between a broker-dealer's self-interest in receiving the remuneration and its customer's interests.

[123] *Id.* at 15 (quoting Securities Confirmations, Exchange Act Release No. 34-13,508, 42 Fed. Reg. 25,318, 25,321 (May 17, 1977)).

[124] SEC *Press* Brief, *supra* note 47, at 17 ("Subparagraph (D), the third-party remuneration provision, requires disclosure of '[t]he source and amount of any other remuneration [i.e., besides customer payments] received or to be received by the broker in connection with the transaction.' Rule 10b-10(a)(2)(i)(D). This language easily reaches fees like those in this case that are not calculated on a per-transaction basis. As the district court ruled, the fees plainly are 'in connection

The SEC next explained that the 1979 No-Action letter was concerned with disclosure of fees paid by the customer, not with fees paid by a third party.[125] Hence, the 1979 No-Action letter did not apply to the payments at issue.[126] Instead, footnote 41 to the Rule 10b-10 adopting release, which permits broker-dealers to rely on a prospectus in order to disclose the required information,[127] applied.[128] With respect to both the 12b-1 fees and the non-12b-1 fees, the SEC believed that the defendants had satisfied their Rule 10b-10 obligations.[129] The SEC pointed out that fund advisors were under an obligation to disclose distribution expenses born by the fund in a prospectus.[130] The purpose of this disclosure was to inform the inves-

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with the transaction;' without the transaction, there would be no fees." (alterations in original)).

[125] *Id.* at 21. The original letter from the Investment Company Institute argued that the disclosure of sales charges paid by investors in a mutual fund in the prospectus delivered to prospective investors prior to any purchase of the mutual fund's shares was sufficient and, therefore, that no additional disclosure on the confirmation was required. Investment Company Institute, SEC No-Action Letter, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,041 at 81,654 (Apr. 18, 1979). The SEC confirmed that it would take no action if there was no additional disclosure on the confirmation. *Id.* at *3. In 1994, the SEC indicated that it "intend[ed] to withdraw the 1979 letter" because relying on the disclosure in the prospectus might "mislead investors into believing that no commission was charged, particularly because many broker-dealers confirm investment company trades with their standard confirmation form, leaving empty the box for 'commission charged.'" Investment Company Institute, SEC No-Action Letter, 1994 WL 131068, at *1 (Mar. 16, 1994). The 1979 No-Action letter was never actually withdrawn. *Press*, 1997 WL 458666, at *3.

[126] SEC *Press* Brief, *supra* note 47, at 21 ("In sum, the no-action letter does not apply to the distribution and advisory fee disclosure requirements at issue in this case.").

[127] *See* Securities Confirmations, Securities Exchange Act Release No. 34-13,508, 42 Fed. Reg. 25,318, 25,322 n.41 (May 17, 1977) ("[I]n the case of offerings registered under the Securities Act of 1933, the final prospectus delivered to the customer should generally set forth the information required by the proviso with respect to source and amount of remuneration. Similarly, tender forms customarily set forth information with respect to fees proposed to be paid to brokers acting as 'soliciting dealers.' In such situations the information specified in the proviso need not be separately set forth on the confirmation.").

[128] SEC *Press* Brief, *supra* note 47, at 24.

[129] *Id.*

[130] *Id.* at 25. These payments are characterized as 12b-1 fees and must be disclosed in accordance with a mutual fund registration form (Form N-1A). *Id.* at 26.

tor of a conflict of interest between the fund and its advisor,[131] but the SEC deemed that the information required was sufficient to inform an investor about any conflict of interest that might exist with respect to the broker-dealer as well.[132] Again, the sole purpose of Rule 10b-10 was to inform the investor about a conflict of interest, and the prospectuses contained enough information to satisfy this purpose, even if exact amounts could not be readily determined.[133]

The Second Circuit adopted the SEC's analysis with respect to defendants' compliance with Rule 10b-10.[134] The court considered itself bound to follow the SEC's interpretation of its own regulations so long as the interpretation was not "plainly erroneous or inconsistent with the regulation[s]."[135] The court briefly examined the elements of the SEC's analysis, concurring with its conclusions that Rule 10b-10 applied to the asset-based fees; that footnote 41 to the original release accompanying Rule 10b-10 permitted defendants to rely on the fund prospectuses; and that the 1979 No-Action letter did not apply to the disclosures required in this case.[136] The court admitted its concern that the prospectuses and SAIs at issue may not have been sufficiently detailed to alert an investor to the existence of a conflict of interest with his own broker-dealer.[137]

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[131] *Id.*

[132] *Id.* at 27. The SEC felt that its original decision to permit disclosure in a prospectus, notwithstanding that a prospectus is not designed for this particular disclosure, required "that a certain amount of leeway is required with respect to the types of disclosure that will be considered adequate." *Id.*

[133] *Id.* at 27-28. With respect to the non-12b-1 fees, the SEC pointed out that it is inherently difficult to report these amounts with specificity because they may not be based on a pre-set formula. The SEC then applied the same rationale as it had applied to the 12b-1 fees, which led the SEC to conclude that some "leeway" be allowed in determining whether disclosure is adequate. Ultimately, the "language [in the prospectus] does more than disclose the mere existence of a conflict and gives some idea of the dimensions of the conflict." *Id.* at 28.

[134] Press v. Quick & Reilly, Inc., 218 F.3d 121, 128-29 (2d Cir. 2000).

[135] *Press*, 218 F.2d at 128 (alteration in original) (quoting Auer v. Robbins, 519 U.S. 452, 461-63 (1997)).

[136] *Id.* at 129.

[137] *Id.* ("[W]e are skeptical that the disclosures . . . , *i.e.*, general statements that payments were made by the funds and their advisers to broker-dealers for their assistance, would actually alert an investor that *his* broker-dealer received such payments . . . .").

However, since the SEC's conclusion was not plainly erroneous, the court adopted the SEC's conclusion that Rule 10b-10 had not been violated.[138]

The Second Circuit, in following the SEC's interpretation of a regulation that the SEC had promulgated when that interpretation was not plainly erroneous, appears to have been acting in accordance with the *Bowles v. Seminole Rock & Sand Co.*[139] *Seminole Rock* requires that a court accept an agency's reasonable interpretation of its own regulations.[140] Although this doctrine has been thoroughly established and its outlines defined by the Supreme Court, it is not without its critics.[141] The principle criticism of *Seminole Rock* deference is that it vests both lawmaking and law-exposition in the same agency and, thereby, threatens the Constitutional scheme of separation of powers.[142] The danger inherent in allowing an agency to both make and interpret regulations without a meaningful interpretive check is that it is a disincentive to that agency to promulgate unambiguous and self-limiting rules.[143] This criticism appears to have relevance to the Second Circuit's rationale in *Press* when one considers the discomfort the court expressed in adopting the SEC's interpretation of the disclosure requirements under Rule 10b-10.[144]

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[138] *Id.*

[139] 325 U.S. 410 (1945).

[140] *Seminole Rock*, 325 U.S. at 414; *see also* Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 702 (1991) (asserting it is axiomatic that Secretary of Labor's interpretation of Department of Labor regulation "need not be the best or most natural one," but rather, "need be only reasonable to warrant deference"); United States v. Larionoff, 431 U.S. 864, 872-73 (1977) (accepting Navy interpretation of Department of Defense regulation because the interpretation was "not plainly inconsistent with the wording of the regulations," even though a number of ambiguities existed); Udall v. Tallman, 380 U.S. 1, 16 (1965) (noting "Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration"). *See generally* 1 DAVIS & PIERCE, *supra* note 71, § 6.10 (stating that controlling weight is given to an agency's interpretation of its own regulation unless it is plainly erroneous or inconsistent with the regulation); John F. Manning, *Constitutional Structures and Judicial Deference to Agency Interpretation of Agency Rules*, 96 COLUM. L. REV. 612, 613-14 (1996) (discussing long-standing administrative law principle that an agency's interpretation of its own regulation should receive deference, even if it is not the best interpretation).

[141] *See* Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 108-09 (1995) (O'Connor, J., dissenting) (criticizing, along with three other justices, the Court's ruling as deferring to the Secretary of Health and Human Services to the extent of giving her power to apply regulations arbitrarily); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 526-28 (1994) (Thomas, J., dissenting) (criticizing, with three other justices, the rationale underpinning *Seminole Rock* deference); *see also* Manning, *supra* note 140, at 615-16 (pointing out that the current Supreme Court has expressed dissatisfaction with the doctrine).

[142] *See* Manning, *supra* note 140, at 638-39. In effect, an administrative agency is permitted to promulgate regulations with the authority of law under power delegated by Congress and then to interpret those same regulations authoritative-

Nonetheless, the doctrine of *Seminole Rock* deference has been thoroughly established and the Second Circuit cannot be faulted for applying it. Given the language of Rule 10b-10 and the rule's history as revealed in the SEC releases, the SEC's interpretation appears to have been reasonable,[145] and the court acted appropriately in adopting that interpretation.[146]

Ultimately the Second Circuit affirmed the district court's dismissal, holding that plaintiffs had failed to create an inference of materiality.[147] The court reasoned that defendants' compliance with Rule 10b-10 constituted a disclosure of the conflict of interest, knowledge of which plaintiffs claimed was material.[148] However, the court acknowledged that its "holding that defendants did not omit material information because defendants were in compliance with Rule 10b-10 [was] not entirely free of tension."[149] This tension arose because the SEC acknowledged that compliance with Rule 10b-10 was not

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ly due to the courts' principle of binding deference. *Id.* at 639. This convergence of promulgation and explication seems to be contrary to the Constitutional scheme which disperses legislative, executive and judicial power between the three, largely independent, branches of the federal government. *Id.* at 641-44.

[143] *Id.* at 655-56 ("[S]ince the agency can say what its own regulations mean (unless the agency's view is plainly erroneous), the agency bears little, if any, risk of its own opacity or imprecision.").

[144] *See supra* notes 32-78 and accompanying text.

[145] *See supra* notes 139-44 and accompanying text.

[146] The question of whether the court was correct in its rationale concerning the plaintiffs' section 10(b) and Rule 10b-5 fraud claim is an entirely different issue discussed *supra* at notes 66-75 and accompanying text. See also *infra* notes 155-81 and accompanying text for a discussion of the relationship of Rule 10b-10 to Rule 10b-5.

[147] Press v. Quick & Reilly, Inc., 218 F.3d 121, 132 (2d Cir. 2000).

[148] *Press*, 218 F.3d at 130 (explaining that knowledge of the conflict of interest was decidedly material but that it had been disclosed).

[149] *Id.*

dispositive of the Rule 10b-5 fraud claim.[150] The plaintiffs had not sought to establish the existence of fraud solely by asserting a violation of Rule 10b-10; rather, they had attempted to create the requisite inference of materiality through establishing a violation of the rule.[151] The defendants argued alternatively that Rule 10b-10 did not apply, that it had not been violated and that a violation was insufficient to establish either scienter or materiality.[152] However the SEC, in the release that accompanied the adoption of Rule 10b-10, stated that while the rule's disclosure requirements did not exhaustively define what information was material, they did refer to information which was presumed to be material.[153] In light of the SEC's position, it would seem that an inference of materiality would be appropriate where a broker-dealer failed to comply with Rule 10b-10's disclosure requirements, although this was not the situation in *Press*.[154]

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[150] SEC *Press* Brief, *supra* note 47, at 28-39; *see also* 17 C.F.R. § 240.10b-10, Preliminary Note (2003) ("The requirements under this section that particular information be disclosed is not determinative of a broker-dealer's obligation under the general antifraud provisions of the federal securities laws to disclose additional information to a customer at the time of the customer's investment decision."); Confirmation of Transactions, Exchange Act Release No. 34-34,962, 59 Fed. Reg. 59,612, 59,615 (Nov. 17, 1994) ("The preliminary note is merely making explicit a longstanding position that the antifraud provisions of the federal securities laws may impose, given the circumstances, greater disclosure than what may be required by a specific rule or regulation."). The plaintiffs had already made exactly the same point. *Press* Plaintiff's Memorandum of Law, *supra* note 46, at 14 n.8 ("*compliance* with rule 10b-10 does not provide a safe-harbor from § 10(b) liability").

[151] *See* Reply Brief of Plaintiff-Appellant at 17, *Press* (Nos. 97-9153, 97-9159) ("[I]nformation required to be disclosed by rule 10b-10 is presumptively material." (citing Securities Confirmations, Exchange Act Release No. 34-13,508, 42 Fed. Reg. 25,318, 25,320 n.28 (May 17, 1977))).

[152] *See Press* Defendants' Memorandum of Law, *supra* note 35, at 9-10 n.7 ("[E]ven if Rule 10b-10 were violated, the mere violation of Rule 10b-10 is not a *per se* violation of Section 10(b) or Rule 10b-5 unless the other requirements of Section 10(b) and Rule 10b-5 are satisfied.").

[153] *See* Exchange Act Release No. 34-13,508, 42 Fed. Reg. 25,318, 25,320 n.28 (May 17, 1977) ("Rule 10b-10 only mandates the disclosure of information which can generally be expected to be material.").

[154] Of course, as the SEC stated in its brief to the Second Circuit, "[t]he fact that the disclosure satisfies Rule 10b-10 does not necessarily mean that there has been no violation of Rule 10b-5." SEC *Press* Brief, *supra* note 47, at 28. The SEC went on to frame the issue as "whether the difference between the information

B. The Relationship Between Rule 10b-10 and Rule 10b-5

The most interesting part of the *Press* opinion is its discussion of the relationship between Rules 10b-10 and 10b-5. In discussing Rule 10b-5, the Second Circuit focused on the issue of materiality rather than the issue of scienter upon which Judge Patterson had focused below. Two other elements of a Rule 10b-5 violation, reliance and "in connection with," were also discussed in the pleadings and merit a short mention.

Judge Patterson had held that, although the defendant brokers had violated Rule 10b-10, the additional information supplied by the money market funds' prospectuses and SAI "negate[d] any inference of fraudulent intent with respect to failure to disclose information regarding commissions or financial interests."[155] As he had held that the plaintiffs had not met their obligation of pleading scienter, Judge Patterson did not have to deal with whether the omissions were material or whether the omissions were "in connection with the purchase or sale of a security."[156]

The Second Circuit addressed materiality, an issue that Judge Patterson had passed over, leaving for another day the issues of intent (although the Second Circuit hinted that it would not have decided the issue as the court below had) and "in connection with."[157] The Second Circuit held that the

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that was disclosed and the greater information that plaintiffs claim should have been disclosed is material." *Id.* at 29. This type of inquiry is traditionally within the province of courts, and the failure of the Second Circuit to make that inquiry is discussed in Part II.B. *infra*.

[155] Press v. Quick & Reilly, No. 96 CIV 4278 (RPP), 1997 WL 458666, at *5 (S.D.N.Y. Aug. 11, 1997); *accord* Strougo v. Bear Stearns & Co., Inc., No. 95 CIV 6532 (RPP), 1997 WL 458667, at *6 (S.D.N.Y. Aug. 11, 1997).

[156] *Press*, 1997 WL 458666, at *5 n.6; *accord Strougo III*, 1997 WL 458667, at *8. Early in both the *Press* and *Strougo III* opinions, Judge Patterson used almost identical language that seems to indicate that he would have found that the "in connection with" element had been met if he had been required to rule on this point. "[T]he Fees . . . are initiated by and, thus, [are] received by the broker *in connection with*, [sic] a transaction, i.e., the *purchase of shares* in a money market fund." *Press*, 1997 WL 458666, at *3 (emphasis added); *accord Strougo III*, 1997 WL 458667, at *4.

[157] "Although we have found that adequate public disclosures may be dispositive of other elements of a plaintiffs' [sic] securities fraud claim, . . . we have

omission was not material; there was, therefore, no need for it to address the "in connection with" element. The brokers had argued that two additional grounds beyond materiality and scienter supported dismissal of the Rule 10b-5 cause of action: both the "in connection with"[158] and reliance elements were not met.[159]

1. "In Connection With"

The brokers argued on appeal that Rule 10b-5 "requires disclosure of material facts *in advance* of a transaction" and that the plaintiffs received their confirmations pursuant to Rule 10b-10 after the transaction; therefore, the alleged omission could not have occurred "in connection with" a transaction.[160]

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never held that such disclosures may, as a matter of law, negate allegations of fraudulent intent. The district court's scienter analysis thus raises serious concerns." Press v. Quick & Reilly, Inc., 218 F.3d 121, 130 (2d Cir. 2000) (citation omitted).

[158] Brief of *Press* Defendants-Appellees, *supra* note 105, at 40-41; *accord* Brief of Defendants-Appellees Bear Stearns & Co., Inc. and Pershing Division of Donaldson Lufkin & Jenrette Securities Corp. at 44-45, Press v. Quick & Reilly, Inc., 218 F.3d 121 (2d Cir. 2000) (No. 97-9159), *aff'g* Strougo v. Bear Stearns & Co., Inc., 95 CIV 6532 (RPP), 1997 WL 458667 (S.D.N.Y. Aug. 11, 1997) [hereinafter Brief of *Strougo* Defendants-Appellees]. In the *Strougo* case, a separate brief was filed with the Second Circuit by defendant-appellee National Financial Services Corp., but this brief addressed only "factual distinctions" from the brief submitted by Bear Stearns and the Pershing Division and "adopt[ed] the legal arguments asserted in the brief" filed by these two co-defendants-appellees. Brief of Defendant-Appellee National Financial Services Corp. at 1 n.2, *Press* (No. 97-9159), *aff'g Strougo* (No. 95 CIV 6532 (RPP)).

[159] Brief of *Press* Defendants-Appellees, *supra* note 105, at 38-40, Reliance was not an issue with which the *Strougo* pleadings dealt. *See* Brief of *Strougo* Defendants-Appellees, *supra* note 158, at 19, 41-45 (mentioning reliance, though discussing only intent, materiality and "in connection with").

[160] Brief of *Press* Defendants-Appellees, *supra* note 105, at 40; *accord* Brief of *Strougo* Defendants-Appellees, *supra* note 158, at 44-45. For cases taking a position similar to that of the defendant brokers, see *Press v. Chemical Investment Service Corp.*, 166 F.3d 529, 537 (2d Cir. 1999) (stating the "in connection with" element requires that the fraudulent act must have induced the purchaser to purchaser a security); and *Arts v. Stifel, Nicolaus & Co.*, 86 F.3d 973, 977 (10th Cir. 1996) (finding that since the "in connection with" element requires a causal connection between the deceptive practice and the injury, a violation of Rule 10b-10 does not satisfy the element if the violation occurs after the transaction is complete). *See generally* Anna Mae Maloney, Semerenko v. Cendant Corp.*: The*

In the district court, the brokers had made a different argument, maintaining that the "in connection with" element was not met "'unless the alleged fraud concerns the *value* of the securities bought or sold, or the consideration received in return.'"[161]

The plaintiffs made both a legal and a factual argument concerning the "in connection with" element. The broadest legal claim, which was made by the plaintiff in *Press,* was that "Rule 10b-5 prohibits conduct that affects the trading process itself whether or not it concerns the value of the securities traded."[162] The factual argument was that the undisclosed pay-

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Third Circuit Clarifies the Security and Exchange Commission's Rule 10b-5 in the Context of Public Misrepresentations, 47 VILL. L. REV. 1171, 1185-86 (2002) (discussing "in connection with" element's requirement that a causal connection be found between the fraudulent act and the purchase of a security on a case-by-case basis); Charles T. Williams, III, Semerenko v. Cendant Corp.*: Has the Time Come to Prune the "Judicial Oak"?*, 27 DEL. J. CORP. L. 587, 595 (2002) (stating that even a broad view of the "in connection with" element requires a causal nexus between the alleged deception and the purchase of a security).

[161] *Press* Defendants' Memorandum of Law, *supra* note 35, at 15-16 (alteration in original) (quoting Bissell v. Merrill Lynch & Co., Inc., 937 F. Supp. 237, 242 (S.D.N.Y. 1996)); *accord* Defendants' Second Amended Complaint Memorandum of Law at 18-19, Strougo v. Bear Stearns & Co., Inc., 1997 WL 458667 (S.D.N.Y. Aug. 11, 1997) (No. 95 Civ. 6532 (RPP)) [hereinafter *Strougo* Defendants' Second Amended Complaint Memorandum of Law]. For cases taking a position similar to that of the defendant brokers, see *Saxe v. E.F. Hutton & Co., Inc.*, 789 F.2d 105, 108 (2d Cir. 1986) (denying claim of fraud because alleged scheme did not concern value of security or consideration received in return); *Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930, 943 (2d Cir. 1984) (asserting misrepresentations or omissions must pertain to security itself to satisfy requirement of 10b-5); *Levitin v. Painewebber, Inc.*, 933 F. Supp. 325, 328 (S.D.N.Y. 1996) (stating that to satisfy Rule 10b-5, misrepresentation must pertain to securities themselves and citing several district court cases asserting same); and Barbara Black, *The Second Circuit Review – 1985-1986 Term: Securities Commentary: The Second Circuit's Approach to the "In Connection With" Requirement of Rule* 10b-5, 55 BROOK. L. REV. 539, 540, 560 (1987) (noting Second Circuit requires something more than "de minimus touch test" and often required that the "misrepresentation relate to the security's value in order to satisfy the 'in connection with' requirement").

[162] Brief for Plaintiffs-Appellants, at 35, Press v. Quick & Reilly, Inc., 218 F.3d 121 (2d Cir. 2000) (No. 97-9153) [hereinafter Brief of *Press* Plaintiffs-Appellants]. For cases taking a position similar to that of the plaintiff, see *Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939, 942-43 (3d Cir. 1985) (noting Rule 10b-5's requirement that fraud be in connection with sale or purchase of security encompasses more than misrepresentations implicating investment value of a security, but mandates only some causal connection between fraud and sale or

ments to the brokers reduced the return on the money market securities that were purchased and therefore reduced the value of the securities themselves.[163] In addition, the concealment of the payments by the money market funds to the clearing brokers "prevented customers from becoming aware that the money market securities were of inferior value."[164]

The Supreme Court's recent decision in *SEC v. Zandford*[165] has clarified that, at least when a broker has failed to meet its fiduciary obligations,[166] the "in connection with" element is to be read broadly.[167] The Court held that in order to meet the "in connection with" element, "[i]t is enough that the scheme to defraud and the sale of the securities

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purchase); *Clapsaddle v. Telscape International*, 50 F. Supp. 2d 1086, 1088 (D.N.M. 1998) (stating fraud provisions of "10(b) and Rule 10b-5 are not limited to garden-variety cases of securities fraud involving deceit as to the actual value of securities bought or sold" (citing Richardson v. MacArthur, 451 F.2d 35, 40 (10th Cir. 1971))). *See generally* Lewis D. Lowenfels & Alan R. Bromberg, *Rule 10b-5's "In Connection With": A Nexus For Securities Fraud*, 57 BUS. LAW. 1, 21 (2001) (supporting the proposition that an omission need not directly pertain to the value of a security to satisfy Rule 10b-5's "in connection with" element and stating that whether an alleged misrepresentation directly affects the value of a security is more properly part of the materiality analysis). The *Strougo* plaintiffs did not fully discuss the "in connection with" issue in their brief to the Second Circuit, *see* Brief for Plaintiffs-Appellants at 49-50, *Press* (No. 97-9159), *aff'g Strougo* (No. 95 CIV 6532 (RPP)) [hereinafter Brief for *Strougo* Plaintiffs-Appellant], although they had fully discussed it in their briefs to the district court, *see Stroug* Plaintiffs' Second Amended Complaint Memorandum of Law, *supra* note 47, at 13-21.

[163] Brief of *Press* Plaintiffs-Appellants, *supra* note 162, at 35.

[164] *Id.* at 36.

[165] 535 U. S. 813 (2002).

[166] *Zandford* involved a broker who allegedly sold securities from a discretionary account and then misappropriated the proceeds. *Zandford*, 535 U.S. at 815.

[167] *Id.* at 819-20. As the Court reasoned,

> [i]n its role enforcing the [34] Act, the SEC has consistently adopted a broad reading of the phase "in connection with the purchase or sale of any security." It has maintained that a broker who accepts payment for securities that he never intends to deliver, or who sells customer securities with intent to misappropriate the proceeds, violates § 10(b) and Rule 10b-5. This interpretation of the ambiguous text of § 10(b), in the context of formal adjudication, is entitled to deference if it is reasonable. For the reasons set forth below, we think it is.

Id. (citations omitted).

coincide,"[168] although there is some tension in *Zandford* as the facts could have supported a narrower holding.[169]

2. Reliance

The issue concerning reliance turned on whether the plaintiffs were entitled to a presumption of reliance when some disclosure had been made, which was the plaintiffs' position,[170] or only when there had been no disclosure, which was the defendants' position.[171] A subsidiary issue was whether reliance was required by subsections (a) and (c) of Rule 10b-5. The plaintiffs argued that "[t]hese subsections do not require either misstatements or omissions of any kind. Accordingly reliance on a misstatement or omission is not an element of a claim under these sections . . . ."[172] Although the brokers did not address these subsections in discussing reliance, they did argue in discussing "in connection with" that the pleading requirements were the same for all three subsections and, alternatively, that the plaintiffs had not properly alleged violations of subsections (a) and (c) in the complaint.[173]

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[168] *Id.* at 822.

[169] The sale of the customer's securities was triggered by the broker writing himself a check. In other words, the broker knew "that redeeming the check would require the sale of securities." *Id.* at 821. It would have been possible, therefore, for the Court to have held that the Fourth Circuit below had been incorrect in characterizing the transactions in question as not involving "a particular sale of securities." SEC v. Zandford, 238 F.3d 559, 564 (4th Cir. 2001).

[170] Brief of *Press* Plaintiffs-Appellants, *supra* note 162, at 38-39.

[171] Brief of *Press* Defendants-Appellees, *supra* note 105, at 38-40. For cases taking a position similar to that of the defendant brokers, see *Binder v. Gillespie*, 184 F.3d 1059, 1063-64 (9th Cir. 1999) (noting *Affiliated Ute* presumption of reliance applies in Rule 10b-5 actions that can be cast as primarily nondisclosure or material omission cases and concluding presumption does not extend to misstatement or mixed misstatement and omission cases (discussing Affiliated Ute Citizens v. United States, 406 U.S. 128, 153 (1972) (holding in cases "involving primarily, a failure to disclose, positive proof of reliance is not a prerequisite to recovery"))); *Steiner v. Southmark Corp.*, 734 F. Supp. 269, 276 (5th Cir. 1990) ("It therefore becomes the duty of this court to characterize analytically a 10b-5 action as either primarily a nondisclosure case—in which instance the *Affiliated Ute* presumption applies—or a positive misrepresentation case."); *Feinman v. Dean Witter Reynolds, Inc.*, No. 94 CIV 7798, 1995 U.S. Dist. LEXIS 13757, at *12 (S.D.N.Y. Sept. 21, 1995) (dismissing claim because presumption of reliance is only applicable in cases of total nondisclosure); and Julie A. Herzog, *Fraud Created the Market: An Unwise and Unwarranted Extension of Section 10(b) and Rule 10b-5,* 63 GEO. WASH. L. REV. 359, 365 (1995) ("Now, as a result of the *Ute* presumption, courts will presume reliance (i.e., transaction causation) in nondisclosure cases, that is, that the nondisclosure influenced the plaintiff to purchase or sell the security.").

[172] Brief of *Press* Plaintiffs-Appellants, *supra* note 162, at 39. For cases taking a position similar to that of plaintiff, see *Finkel v. Docutel/Olivetti Corp.*, 817

3. Disclosure

As a preliminary matter, the Second Circuit held that "knowledge that [the plaintiffs'] broker-dealers have a conflict

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F.2d 356, 359-60 (5th Cir. 1987) (asserting "[c]ases involving primarily a failure to disclose implicate the first and third subsections of Rule 10b-5," to which a presumption of reliance may apply, while "cases involving primarily a misstatement . . . implicate the second subsection" and require proof of reliance upon the misstatement); *Rifkin v. Crow*, 574 F.2d 256, 262 (5th Cir. 1978) ("[W]here a 10b-5 action alleges defendant made positive misrepresentations of material information, proof of reliance by the plaintiff upon the misrepresentation is required . . . [W]here a plaintiff alleges deception by defendant's nondisclosure . . . the *Ute* presumption obviates the need for plaintiff to prove actual reliance . . . ."); and Herzog, *supra* note 171, at 364-65 (1995) (explaining Supreme Court distinguished part (b), concerned with "the making of an untrue statement of material fact, a failure to disclose a material fact, or the making of a 'half-truth,'" from parts (a) and (c), which "reflect a broader concern: fraud in a 'course of business' or through a 'device, scheme, or artifice,'" and that in these cases, "plaintiff need not present positive proof of reliance . . . [but] need only prove that the facts withheld were material . . . .").

[173] Brief of *Press* Defendants-Appellees, *supra* note 105, at 42 n.25. For cases taking a position similar to that of the defendant brokers, see *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 376 (1990) (explaining private section 10(b) action "requires proof of a false or misleading statement or material omission"); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 474–75 (1977) (finding no cause of action under Rule 10b-5 because "complaint failed to allege a material misrepresentation or material failure to disclose"); and *In re Lake States Commodities, Inc.*, 936 F. Supp. 1461, 1472–73 (N.D. Ill. 1996) (holding although Rules 10b-5 (a) and (c) do not explicitly require misstatements or omissions, absence of such an allegation prevents claim from being stated under section 10(b) or Rule 10b-5). *See generally* Michael P. Kenny & Teresa D. Thebaut, *Misguided Statutory Construction to Cover the Corporate Universe: The Misappropriation Theory of Section 10(b),* 59 ALB. L. REV. 139, 207-09 (1995) (explaining that section 10(b) liability may not be imposed in the absence of a deception that takes the form of a material misrepresentation or omission and commenting that a breach of fiduciary duty alone should not suffice).

In its amicus brief, the SEC did not even raise the reliance or "in connection with" elements as possible issues. SEC *Press* Brief, *supra* note 47, at 29 ("In our view, the important issues [under Rule 10b-5] are whether the omitted information is material and whether the omissions were made with scienter.").

of interest, *i.e.*, that their broker-dealers are paid by the money market funds the broker-dealers selected for 'automatic sweeps' of plaintiffs' uncommitted account balances, is material."[174] The issue then became whether meeting the requirements of Rule 10b-10 was adequate to disclose this alleged conflict of interest. In holding that compliance by the defendant brokers with the requirements of Rule 10b-10 meant that the brokers had made all the disclosure required by section 10(b) and Rule 10b-5, the Second Circuit relied upon the underlying theory of the plaintiffs' actions and Rule 10b-10. In the Second Circuit's view, the plaintiffs were arguing that Rule 10b-5 required "'greater disclosure'" than Rule 10b-10 in order to provide "adequate disclosure of the broker-dealer defendants' conflict of interest."[175] In the SEC's view, Rule 10b-10 was directed at ensuring adequate disclosure of the same conflict of interest.[176] This "crucial common ground between the purpose of Rule 10b-10 and the reason plaintiffs claim additional disclosure was necessary under Rule 10b-5" led the Second Circuit to conclude that all material information had been disclosed.[177]

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[174] Press v. Quick & Reilly, Inc., 218 F.3d 121, 130 (2d Cir. 2000). Neither the Second Circuit nor the district court ever discussed another issue that the defendants had raised below but which they did not raise in their Second Circuit briefs: whether the defendants were fiduciaries for the plaintiffs. *See Press* Defendants' Memorandum of Law, *supra* note 35, at 10-13; *accord Strougo* Defendants' Second Amended Complaint Memorandum of Law, *supra* note 47, at 13-16. The defendants argued that, without a fiduciary relationship, they had no duty to disclose the alleged fees to the plaintiffs. *Press* Defendants' Memorandum of Law, *supra* note 35, at 12-13; *accord Strougo* Defendants' Second Amended Complaint Memorandum of Law, *supra* note 47, at 16. *Compare* Chiarella v. United States, 445 U.S. 222, 229 (1980) ("Accordingly, a purchaser of stock who has no duty to a prospective seller because he is neither an insider nor a fiduciary has been held to have no obligation to reveal material facts."); *and In re* Enron Corp. Sec., 235 F. Supp. 2d 549, 574 (S.D. Tex. 2002) ("When the cause of action under § 10(b) is based on an allegation of a material omission, the plaintiff must demonstrate that the defendant had a fiduciary duty to disclose to the plaintiff."); *with* United States v. O'Hagan, 521 U.S. 642, 652–53 (1997) (discussing classical and misappropriation theories of insider trading liability and explaining that misappropriation theory is premised on protecting against abuses by outsiders who have confidential information but owe no fiduciary duty); *and* SEC v. Gonzalez de Castilla, 145 F. Supp. 2d 402, 412 (S.D.N. Y. 2001) (explaining misappropriation theory targets outsiders with confidential information "'but who owe no fiduciary or other duty'" (quoting Dirks v. SEC, 463 U.S. 646, 653 (1983))); Joseph J. Urgese, United States v. O'Hagan: *Rule 10b-5, the "Judicial Oak which has Grown from Little More than a Legislative Acorn," and the Antifraud Legislation of the Securities and Exchange Act of 1934*, 31 AKRON L. REV. 431, 449-50 (1998) (discussing expansion of duty to disclose via the misappropriation theory but noting expansion was limited by facts of *O'Hagan* where there was a close nexus between information and use). *See generally* Marshall H. Fishman & Dan A. Rosenbaum, *Fiduciary Duties Affect Broker-Customer Relations*, N.Y.L.J., June 5, 2000, at 1 (discussing recent federal cases applying New York law on the nature of the duties owed by brokers to their customers).

The Second Circuit engaged in speculation about the reasoning that, in its view, must have underpinned the SEC's conclusion that the defendants' disclosure obligation under Rule 10b-10 had been met. If the purpose of Rule 10b-10, as the SEC had repeatedly stated in its amicus brief, was to provide disclosure of any conflict of interest[178] and the SEC had concluded that the defendant brokers had complied with Rule 10b-10, then, in the Second Circuit's view, "the SEC must have determined, as a policy matter, that the broker-dealer defendants' conflict of interest was sufficiently disclosed to plaintiffs."[179] The Second Circuit could arrive at this conclusion only by ignoring the SEC's own explicit statement in its amicus brief that "[t]he fact that the disclosure satisfies Rule 10b-10 does not necessarily mean that there has been no violation of Rule 10b-5."[180] The SEC went on to state that the issue of materiality was a "fact-bound" one and that the SEC "does not ordinarily address these sorts of fact-bound issues in an amicus brief."[181]

In effect what the Second Circuit was trying to do was to make its holding fit within the *Seminole Rock* doctrine, although it never described its reasoning in exactly these words.

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[175] *Press,* 218 F.3d at 131.

[176] *Id.* at 126 (quoting SEC *Press* Brief, *supra* note 47, at 9).

[177] *Id.* at 131.

[178] *See id.* (quoting three different statements in the *Press* SEC Brief to this effect).

[179] *Id.* Further down on the same page, the Second Circuit rephrased this conclusion: "Thus, in concluding that defendants were in compliance with Rule 10b-10, the SEC necessarily concluded that the general disclosures in the prospectuses and SAIs achieve the purpose of Rule 10b-10, *i.e.*, adequate disclosure of the broker-dealer defendants' conflict of interest." *Id.*

[180] SEC *Press* Brief, *supra* note 47, at 28.

[181] *Id.* at 30.

In the Second Circuit's reasoning, it was as if the SEC had determined under Rule 10b-5 that disclosure of additional information concerning the alleged conflict of interest was not material. This type of administrative construction of its own rule would be given great deference by the courts under *Seminole Rock*. Ultimately, the Second Circuit was saying that the area of broker-dealer regulation, particularly as it bears upon the relationship between broker-dealers and their customers, is not one in which the courts should be involved.

III. THE PAYMENT FOR ORDER FLOW CASES

The payment for order flow cases are a series of class actions brought primarily under state law that have challenged certain payments by broker-dealers for orders sent to them for execution. Although there have been a handful of exceptions, most courts that have decided these cases have held that the SEC's regulatory scheme has preempted any state law challenges to this practice. There is little support for this legal conclusion. In fact, several of the most important payment for order flow opinions display a split between their description of the actions that the SEC had taken prior to the commencement of the class action and their holdings. Reading the introductory historical portions of these opinions, the reader could easily believe that the courts were going to conclude that the state law causes of action were not preempted.

The practice of payment for order flow started in the over-the-counter (OTC) market with payments made by market makers, i.e., dealers in OTC securities, to their regional correspondent brokerage firms. Market maker firms later began to make payments for order flow to other retail brokers until the practice of paying for order flow became common in the OTC market.[182] While payment for order flow in the OTC market has a longstanding history, it is only in the past thirteen years that it has spread to listed securities, starting with payments by third market makers[183] and then by some regional specialists.[184] The SEC believes that some integrated broker-dealer firms may now be paying for order flow.[185] Although the amount of cash paid per share for an order is relatively small, one or two cents per share, the aggregate amounts are significant because "between 15% and 20% of the order flow in listed stocks is routed pursuant to cash payment arrangements."[186]

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[182] Payment for Order Flow, Exchange Act Release No. 34-33,026, 58 Fed. Reg. 52,934, 52,935-36 (Oct. 13, 1993). "Because of their lack of retail networks, wholesale firms[, in contrast to the integrated broker-dealers,] often are dependant on their ties to other broker-dealer firms for order flow." *Id.* at 52,936 n.15. One study traces these practices back to the 1960s. NASD, Inducements for Order Flow, A Report to the Board of Governors, National Association of Securities

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Dealers, Inc. 36 (1991).

[183] The "third market" is the securities industry's term for OTC trading of exchange listed securities. SEC, MARKET 2000: AN EXAMINATION OF CURRENT EQUITY MARKET DEVELOPMENTS II-10 (Jan. 1994) [hereinafter MARKET 2000]. These listed securities tend to be the 400 most active New York Stock Exchange (NYSE) stocks and a handful of American Stock Exchange (Amex) stocks. Third market makers have been competing by providing automated execution systems for small orders, paying for order flow, and not charging any fees or commissions. They have been quite successful. "In 1989, the third market garnered 3.2% of reported NYSE volume and five percent of the reported trading; in 1993 this percentage had increased to 7.4% of reported NYSE volume and 9.3% of the reported trades." *Id.* at II-11. See *id.* at II-1 to -23 for a description of the current markets for securities in the United States. *See generally* Michael J. Simon & Robert L.D. Colby, *The National Market System for Over-the-Counter Stocks*, 55 GEO. WASH. L. REV. 17 (1986) (describing the development of the OTC market).

[184] Payment for Order Flow, 58 Fed. Reg. at 52,936.

[185] *Id.*

[186] *Id.* In 2001, the average daily number of shares traded on the NYSE was 1,240,000,000 shares. NEW YORK STOCK EXCHANGE, INC., FACT BOOK FOR THE YEAR 2001, at 12 (2002). At one cent per share, payments for fifteen percent of the daily average order flow of NYSE listed shares alone would total approximately $1,860,000 per day. By 2002, the average daily number of shares traded in the NYSE was 1,441,000,000, NEW YORK STOCK EXCHANGE, INC., FACT BOOK FOR THE YEAR 2002 (2003), *available at* http://www.nysedata.com/factbook/viewer_edition.asp?mode=table&key=5&category=3, although a much smaller percentage of shares would have attracted payments for order flow due to the decimalization of stock prices, *see infra* note 194. It should be noted that the SEC figures on the percentage of order flow in listed securities that is routed pursuant to payment for order flow arrangements are only estimates. Payment for Order Flow, 58 Fed. Reg. at 52,936. In addition, evidently more is paid for unlisted than for listed stocks. *Id.* at 52,936 n.16. One prominent third market maker, Bernard L. Madoff Investment Securities, has estimated that it paid approximately $10 million in 1992 for order flow. *Hearings on Inducements for Order Flow Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce,* 103d Cong., 1st Sess. 409 (1993). At the same time, this firm did approximately ten percent of the transaction volume and seven percent of the share volume on the NYSE. *Id.* at 410. One newspaper article, in guessing at the

As the practice of paying for order flow has grown, the trading volume of listed securities done on the primary exchanges has declined. For example, from 1978 to 1992 the percentage of consolidated tape trades in New York Stock Exchange stocks executed by the NYSE dropped from 85.99% to 65.17%, while the percentage executed by the regional exchanges and NASDAQ climbed from 11.55% to 24.22% and 2.39% to 10.57% respectively.[187]

No study demonstrates how important a factor payment for order flow has been in this migration of trading off exchanges. It is worth noting, however, that the NYSE, the American Stock Exchange, the Chicago Stock Exchange (formerly the Midwest Stock Exchange), and the Specialist Association are all proponents of bans on cash payments for order flow, at least with respect to exchange listed securities.[188] Other regional exchanges have taken no position on whether cash payments for order flow should be banned.[189] The National Association of Securities Dealers (NASD), however, has supported payment for order flow by arguing that this practice increases competi-

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amount derived from internalization of order flow, *see* Payment for Order Flow, 58 Fed. Reg. at 52,939 n.38, gave a figure of $500 million annually. William Power, *"In-House" Trades Can Be Costly for Small Investors*, WALL ST. J., Dec. 20, 1994, at C1. This figure, of course, includes the entire dealer spread that is being captured, not just the amount that a third party dealer would pay to capture this amount of business. *Id.*

[187] MARKET 2000, *supra* note 183, at Ex. 18. See *supra* note 183 for a description of the inroads of third market makers on trading in exchange listed shares.

[188] Letter from Jules L. Winters, Chief Operating Officer, Amex, to Jonathan G. Katz, Secretary, SEC (Dec. 21, 1993); Letter from David E. Humphreville, Executive Administrator, the Specialist Association, to Jonathan G. Katz, Secretary, SEC (Dec. 17, 1993); Letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Jonathan G. Katz, Secretary, SEC (Dec. 9, 1993); MSE, Petition to the Securities and Exchange Commission for Issuance and Amendment of Rules of General Application (May 18, 1990) (petition to amend rules 10b-10 and 11ES3-1 and adopt a new rule 11Ac1-4 "to eliminate the harmful effects of the growing practice of market makers making cash payments to brokers for their customer order flow in *exchange traded securities*" (emphasis added)).

[189] Letter from John I. Fitzgerald, Executive Vice President, Legal Affairs and Trading Services, Boston Stock Exchange, to Jonathan G. Katz, Secretary, SEC (Dec. 10, 1993); Letter from William W. Uchimoto, General Counsel, Philadelphia Stock Exchange, to Margaret H. McFarland, Deputy Secretary, SEC (Dec. 10, 1993); Letter from Leopold Korins, Chairman and Chief Executive Officer, the Pacific Exchange, to Jonathan G. Katz, Secretary, SEC (Dec. 9 1993).

tion, encourages innovations in order processing and reduces costs for customers.[190]

Payment for order flow has been the subject of extensive study by the SEC, the NASD and other self-regulatory organizations, the Congress and legal and financial academics.[191] A series of alleged problems involving the structure of the securities markets, state agency law and the federal securities laws were identified by these commentators.[192] The result of all this study was the promulgation of new disclosure standards for payments for order flow by the SEC in 1995.[193]

As a practical matter, payment for order flow in the equity markets may be a declining industry practice due to the move to decimalization of stock prices and the resulting decline in spreads, which were the source for the money to pay for order flow.[194] In the option markets, in contrast, payment for order flow has increased dramatically.[195] The facts that options, since 1999, can be listed on more than one market[196] and that spreads in the option markets remain at a minimum of five cents, versus the one cent in the equity markets, help to explain this increase.[197]

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[190] NASD Responds to SEC's Market 2000 Concept Release, NASD Notice to Members 92-67, 1992 WL 1319296, at *2 (Dec. 1992); Letter from Richard Ketchum, Executive Vice President and Chief Operating Officer, NASD, to Jonathan G. Katz, Secretary, SEC (Dec. 3, 1993).

[191] For a description of these studies through 1995, see Facciolo & Stone, *supra* note 30, at 644-45 nn.387-90. For an updated list of studies, see the most recent academic article on payment for order flow, Allen Ferrell, *A Proposal of Solving the "Payment for Order Flow Problem,"* 74 SO. CAL. L. REV. 1027 (2001).

[192] For a description of these problems, see Facciolo & Stone, *supra* note 30, at 654 nn.391-93 and text accompanying *id.* at 654-57 nn.407-10.

[193] For a description of the process leading up to these rules, see *id.* at 647 n.394. For a description of the rules, see text accompanying *id.* at 648-54 nn.395-406.

[194] Alex Berenson, *On Nasdaq, Pennies May Be Good for Small Players*, N.Y. TIMES, June 24, 2001, § 3, at 8; John Labate, *Ameritrade Hit by Slowdown in Retail Investing*, FIN. TIMES, July 25, 2001, at 25 ("Online brokers have been hit by several factors other than the hesitations of retail investors. Revenue lines including payment for order flow from marketmakers . . . are drying up . . . .").

[195] *SEC, Special Study: Payment for Order Flow and Internalization in the Options Markets* (Dec. 2000) *at* http://www.sec.gov/news/studies/ordpay.htm.

[196] *Id.*

[197] *See* Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc, Exchange Act Release No. 34-43,100, 65

A. Preemption

The plaintiffs in the payment for order flow cases have all been customers of the defendant brokers. The defendants are alleged to have violated their common law fiduciary obligations to their customers and, in some cases, state statutory provisions involving commercial bribery.[198] The essential actions alleged in the complaints have been that the defendant brokers accepted payments for order flow with respect to the sale or purchase by customers of securities without either passing these payments onto the customers or disclosing the payments and obtaining the customers' consent to retaining the payment.[199] In addition, many of the cases also contain a complaint that receipt of payments for order flow caused the defendant broker to violate its duty to its customers of best execu-

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Fed. Reg. 48,778, 48,783 (Aug. 9, 2000) (suggesting that specialists in the options markets could choose to pay for order flow, rather than tighten spreads, in order to remain competitive); Self-Regulatory Organizations; Chicago Board Options Exchange, Inc.; Order Approving Proposed Rule Change, Exchange Act Release No. 34-41,121, 64 Fed. Reg. 11,523, 11,526 (March 9, 1999) (stating that, options specialists could use wider spreads to finance payment for order flow arrangements). *See generally* Annette L. Nazareth, Director of the Division of Market Regulation, Keynote Address at the 2001 Options Industry Conference (April 27, 2001), *at* 2001 WL 474785, at *3 (stating that, due to payment for order flow practices, the trading of options in multiple markets has lead to a widening of spreads following the initial decline).

[198] *See, e.g.,* Orman v. Charles Schwab & Co., 688 N.E.2d 620, 621 (Ill. 1997) ("Plaintiffs' complaints allege breach of fiduciary duty and breach of contract premised upon defendants' failure to remit the order flow payments they received to the plaintiffs."); Dahl v. Charles Schwab & Co., 545 N.W.2d 918, 920 (Minn. 1996) ("Respondents allege that these payments – which they label kickbacks – constitute a beach of Schwab's fiduciary responsibilities under the state's common law of agency and a violation of Minnesota Uniform Deceptive Trade Practices Act, and the Minnesota Prevention of Consumer Fraud Act.") (citations omitted); Guice v. Charles Schwab & Co., 674 N.E.2d 282, 284 (N.Y. 1996) ("Plaintiffs' complaints allege that the defendants' acceptance of order flow payments breached the fiduciary relationship between them and their customers in the plaintiff member classes under common-law agency principles . . . They also allege illegality of the acceptance of order flow payments as a form of commercial bribery (citing Penal Law § 180.05) and a violation of State securities law (the Martin Act) (citing General Business Law § 352-c).").

[199] *See, e.g., Orman*, 688 N.E.2d at 621; *Dahl*, 545 N.W.2d at 925; *Guice* 674 N.E.2d at 288-89.

tion[200] because the market where securities transactions were executed was chosen by the broker not to give the customers the best price or any of the other factors that can indicate best execution, but rather to generate payments for order flow for the broker.[201]

The defendants in the payment for order flow cases have raised two main defenses: SEC regulatory action has preempted the area of disclosure of payment for order flow and, alternatively, the courts should have remanded these actions to the SEC under the doctrine of primary jurisdiction.[202] As only a handful of the published decisions (and none of the highest state court opinions) have substantively discussed primary jurisdiction,[203] this Article will focus on the preemption arguments. The courts have relied upon three separate theories in holding that state law causes of action were preempted by Congressional and/or SEC intent, with some cases relying on more than one theory. One theory has focused on express conflict preemption, holding that the SEC's Rule 10b-10, either prior or subsequent to its amendment in 1995, expressly dealt with payments for order flow and that there is an express conflict between the SEC's intent to allow the practice with limited disclosure and state law, which, if applied, would prevent, as a practical matter, any payment for order flow.[204] Another theory has focused on implied conflict preemption, holding that Congress' intent to create a national market system would be frustrated by allowing different states to impose differing requirements upon the disclosure about, and receipt of, payments for order flow.[205] And the final theory has focused on field preemption, holding that the SEC's "regulation of the narrow subject of disclosure of order flow payments is so thorough that we have no difficulty in finding the 'reasonable inference' . . . that no room has been left for a state to impose additional requirements."[206]

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[200] See *infra* text accompanying notes 316-33 for a brief discussion of the duty of best execution.

[201] *See, e.g., Guice* 674 N.E.2d at 284 ("Plaintiffs also allege that the acceptance of order flow payments itself is illegal and actionable because it violates a broker's duty to obtain the 'best execution' (i.e., execute the transaction under the most favorable possible terms) of its customers' orders.").

[202] See Facciolo & Stone, *supra* note 30, at 664-69 for a discussion of primary jurisdiction and the 1934 Act.

[203] For published payment for order flow cases discussing primary jurisdiction, see *Dahl v. Charles Schwab & Co.*, 524 N.W.2d 742, 747 (Minn. Ct. App. 1994) (rejecting application of primary jurisdiction), *rev'd on other grounds,* 545 N.W.2d 918 (Minn. 1996); and *Guice v. Charles Schwab & Co.*, 630 N.Y.S.2d 317, 319 (App. Div. 1995) (same), *rev'd on other grounds,* 674 N.E.2d 282 (N.Y. 1996).

[204] *See, e.g.,* Gilman v. BHC Sec., Inc., No. 94 Civ. 1133, 1995 WL 747738, at *5-6 (S.D.N.Y. Dec. 18, 1995) (relying on new Rule 10b-10), *rev'd on other grounds,* 104 F.3d 1418 (2d Cir. 1997); Dumont v. Charles Schwab & Co., 717 So. 2d 1182, 1185-87 (La. Ct. App. 1998) (relying on old Rule 10b-10), *settlement approved*, 2000 WL 1023231 (E.D. La. July 21, 2000). In *Gilman,* the court found that the "[c]omplaint unambiguously complains of the practice of payment for

All of the preemption arguments are weak ones. The simplest way to understand the weakness is to note that the SEC said nothing in the new payment for order flow rules about state law issues and the rules. Although, in 1994 in the adopting release, it cited to a number of state court cases challenging payment for order flow, including two that had been dismissed on preemption grounds,[207] and discussed the best execution and agency law issues in 1993 in the proposing release,[208] the SEC did not state in either the proposing or adopting release

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order flow generally and not whether the disclosure was adequate." *Gilman*, 1995 WL 747738, at *5. The remedies sought would have prevented any payment for order flow on a going forward basis and, thus, would have conflicted with the new payment for order flow rules in which "the SEC chose to continue the practice of allowing payment for order flow, with certain enhanced disclosure requirements, rather than follow one of the other courses of conduct that had been proposed." *Id.* The rejected courses had "included an outright ban on payment for order flow and requiring brokerage firms to pass through payment for order flow to its customers," *id.*, exactly the remedies that, in the *Gilman* court's view, the plaintiff in *Gilman* sought. Therefore, there was an express conflict between the remedies sought and the new payment for order flow rules. *Accord Guice*, 674 N.E.2d at 290-91.

[205] *See, e.g., Guice*, 674 N.E.2d at 289-90.

[206] Shulick v. Painewebber, Inc., 722 A.2d 148, 151 (Pa. 1998) (reasoning that "[t]he present case does not present a claim of express preemption; nor does it present a situation where compliance with both federal and state laws is a patent impossibility, although compliance with both would obviously be burdensome to the securities industry").

[207] Payment for Order Flow Exchange Act Release No. 34-3902, 59 Fed. Reg. 55,006, 55,007 n.10 (Nov. 2, 1994) ("Private litigation in several state courts is pending regarding payment for order flow. Two cases were dismissed on grounds of federal preemption and are currently on appeal." (citations omitted)).

[208] Payment for Order Flow, Exchange Act Release No. 34-33,026, 58 Fed. Reg. 52,934, 52,937-39 (Oct. 13, 1993).

that it was or was not preempting relevant state common law and statutory provisions through the adoption of the new payment for order flow rules.

Failure to evidence a clear intent to preempt state law when the issue was clearly presented for resolution dictates that a court should hold that there was no preemptive intention by the SEC.[209] For a court to imply an intention to preempt when the legislative or regulatory body, in this case the SEC, acknowledges that this is an issue but takes no position on it means that the court has moved way beyond the legal fictions usually employed in determining legislative or regulatory intent. This is not a case of determining what the legislative or regulatory intent would have been if the legislature would have considered a particular type of activity that was not in fact considered at the time the legislation or regulation was enacted.[210] It may well be that the SEC was unwilling to clarify the preemptive impact of the new payment for order flow rules out of a concern for either the unpopularity of payments for order flow[211] and, therefore, the political unpopularity that could arise from preempting state law challenges to such practices, or the political unpopularity that could arise from interfering with state agency law.[212] For a court to then attempt to divine the SEC's intent is to substitute the court's guess about what the SEC would have done if there had been no political concerns and processes for what the SEC in fact did do in light of these concerns and processes. The court has then abrogated to itself the powers of an administrative agency without the checks on these powers that political accountability provides.[213] In addition, the court is now making general public policy without any of the tools of expertise and public input that an administrative agency brings to bear upon a problem.[214]

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[209] *See, e.g.,* Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 309 n.12 (1988) (explaining that an agency's regulations generally should not be found to preempt state law absent a specifically stated intent to do so); Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 717-18 (1985) (stating that courts should not find that an agency's regulations preempt state law simply because the regulations are comprehensive because an agency should be expected to clearly express an intention to preempt state law); *cf.* Egelhoff v. Egelhoff, 532 U.S. 141, 151 (2001) (noting that in areas of traditional state regulation, there is a presumption against federal preemption that is overcome only by a clearly expressed intention to preempt state authority). *But see* Geier v. Am. Honda Motor Co., 529 U.S. 861, 884 (2000) (explaining that a formal statement of an agency's intention to preempt state law is not required).

[210] *See, e.g.,* Fed'n of Adver. Indus. Representatives, Inc. v. City of Chicago, 189 F.3d 633, 636-38 (7th Cir. 1999) (discussing the presumption against preemption and finding that in a case in which the issue at hand is not specifically addressed by the federal statute, Congress's goals must govern the preemption analysis); Am. Auto. Mfrs. Ass'n v. Mass. Dep't of Envtl. Prot., 998 F. Supp. 10, 22 (D. Mass. 1997) (stating that where a federal statute's explicit preemption language does not address the issue before a court, the court should look to the structure and purpose of the statute to determine whether the statute reveals an implicit congressional intent to preempt state law); Doe v. Plyler, 458 F. Supp. 569, 592 (D.C. Tex. 1978) (stating that where a federal statute does not expressly address the conduct at issue, the comprehensive scheme of the statute must be considered to determine whether it preempts state law). *See generally* Philip H. Corby & Todd A. Smith, *Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption,* 15 AM. J. TRIAL ADVOC. 435, 444-49 (1992) (discussing doctrinal bases of implied preemption).

The SEC's failure to state, when adopting the new payment for order flow rules, that they were intended to preempt state law is not necessarily fatal to a finding of implied conflict preemption.[215] A subsequent interpretation by the SEC that such a conflict existed would be entitled to "some weight" by the courts.[216] The fact is, however, that the SEC has never expressed, either before or after enactment, any position on the preemptive affect of the new payment for order flow rules. Similarly, the refusal by the SEC to regulate a particular industry-wide practice should have no preemptive affect unless the SEC has expressed this intent at the same time.[217]

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[211] *See* Facciolo & Stone, *supra* note 30, at 673 n.451; Gretchen Morgenson, *A Request for the Boss-to-Be at the S.E.C.*, N.Y. TIMES, May 13, 2001, § 3, at 1 (requesting a "[b]an [on] payment for order flow"). It should be noted that, when the SEC has wanted to preempt state law through a regulatory initiative in other contexts, it has made its intentions clear. *See* Facciolo & Stone, *supra* note 30, at 564-65.

[212] *Cf.* George W. Dent, Jr., *Ancillary Relief in Federal Securities Law: A Study in Federal Remedies*, 67 MINN. L. REV. 865, 913-22 (1983) ("Whenever the SEC has suggested direct regulation of, or disclosure rules affecting, corporate governance, commentators and the bar have questioned the Commission's authority.").

[213] *See* Lisa Schutltz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State,* 78 N.Y.U.L. REV. 461, 475-77 (2003) (discussing public participation in notice-and-comment rulemaking and judicial review of administrative agency decisions as the primary safeguards against arbitrary acts by agencies in current administrative law).

[214] *See* Joy Krautzer, *Agency Rules: Can Agencies Play By Them?* Arctic Express, Inc. v. United States Department of Transportation, 5 T.M. COOLEY J. PRAC. & CLINICAL L. 21, 26 (2002) (stating that an agency's decision-making process and its expertise in its limited subject area renders an agency better equipped than a court to make public policy in its limited area).

[215] Geier v. Am. Honda Motor Co., 529 U.S. 861, 884 (2000).

The discomfort of the courts that have decided that preemption applied in the payment for order flow cases can be seen in the language and structure of their opinions. In *Dahl v. Charles Schwab & Co.*,[218] for example, the Supreme Court of Minnesota spent most of its opinion rejecting the various preemption arguments raised by Charles Schwab & Co. Finally, the *Dahl* court arrived at conflict preemption, specifically the branch that holds that implied preemption arises when a "state law presents an obstacle to the accomplishment of the purpose of the federal law."[219] The *Dahl* court pointed out that Minnesota law requires a "principal's consent after full disclosure of facts which might affect the principal's decision" when an agent profits from the relationship or engages in self-dealing.[220] To comply with Minnesota's agency law, Schwab would have had to first determine the exact amount of payment for order flow related to each individual transaction in order to seek its customers' consent and then remit such payment if there was no consent.[221] Schwab contended that it was impossible to calculate the amount of payment for order flow on a sale-by-sale basis and, therefore, "any ruling which implies that the order flow payments might have to be remitted to the customer on a case-by-case basis would be impossible to fulfill and would require the termination of the practice of order flow payments."[222] As federal law allowed such payments, the *Dahl* court held that "the remedy respondents seek could frustrate the objectives of the SEC and Congress."[223]

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[216] *Geier*, 529 U.S. at 883.

[217] *See* Sprietsma v. Mercury Marine, 537 U.S. 51, 64-65 (2002) ("We first consider, and reject, respondent's reliance on the Coast Guard's decision not to adopt a regulation requiring propeller guards on motorboats. It is quite wrong to view that decision as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation.").

[218] 545 N.W.2d 918 (Minn. 1996).

[219] *Dahl*, 545 N.W.2d at 925.

[220] *Id.*

[221] *Id.*

This implied preemption argument is a particularly weak one in light of the record in the *Dahl* case. *Dahl* reached the Supreme Court of Minnesota as an appeal from a summary judgment motion by Charles Schwab & Co.[224] Although it started as a motion to dismiss, the trial court, on its own motion, converted it to a motion for summary judgment.[225] Nothing in the briefs submitted by Charles Schwab & Co. gives any firm foundation to the factual predicates concerning payment for order flow upon which the *Dahl* court relies.

In asserting that "[t]he benefits accruing from aggregation [of orders] cannot be translated after the fact to attach to each individual order, because no firm would be able to negotiate a cash payment, fee reduction or other benefit for a single or small number of orders,"[226] Charles Schwab & Co. cited to a footnote in the proposing release for the new payment for order flow rules that presented no conclusion as to the impossibility of such a translation but rather demonstrated only that there is a split in the securities industry over whether such a translation could be made.[227] The SEC itself considered requiring such disclosure of payment for order flow upon each confirmation for each order,[228] although it ultimately rejected such disclosure.[229] But the grounds for rejection were not specified by the SEC other than to cite to the concerns raised by "[m]ore than 30 commenters,"[230] which ranged from comments that it would be "nearly impossible" to make such disclosure to comments "that specific disclosure would require broker-dealers to reprogram computer systems, perform tracking and report cash payments, and that such expenses are disproportionately high in relation to the potential benefits to customers."[231] The SEC settled upon requiring generalized disclosure on each confirmation about "whether payment for order flow is received by the broker or dealer for transactions in such securities" and providing "that the source[s] and nature of the compensation received in connection with the particular transaction will be furnished upon written request of the customer."[232] As the SEC explained, the purpose of this disclosure was limited to "inform[ing] customers about the existence of payment for order flow practices and . . . confirm[ing] that which the customer, if interested, already should know about the broker's order handling practices as a result of the new account and annual disclosure statements."[233] In the adopting release, the SEC specifically stated that "[t]he Commission recognizes that information on the confirmation may not communicate all information of interest to investors about payment for order flow or the quality of order execution."[234]

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[222] *Id.*

[223] *Id.*

[224] Dahl v. Charles Schwab & Co., 524 N.W.2d 742, 743 (Minn. Ct. App. 1994), *rev'd,* 545 N.W.2d 918 (Minn. 1996).

[225] Respondent's Brief at 2 n.3, Dahl v. Charles Schwab & Co., 524 N.W.2d 742 (Minn. Ct. App. 1994) (No. C1-94-1040).

[226] Appellant's Reply Brief at 11, *Dahl* (No. C1-94-1040).

[227] Payment for Order Flow, Exchange Act Release No. 34-33026, 58 Fed. Reg. 52,934, 52,940 n.47 (Oct. 13, 1993).

[228] *Id.*

[229] Payment for Order Flow, Exchange Act Release No. 34-34,902, 59 Fed. Reg. 55,006, 55,010 (Nov. 2, 1994).

[230] *Id.*

None of the language used by the SEC suggests that it found disclosure of payment for order flow with respect to each order impossible, and, therefore, that state agency law was preempted. In fact, the language just quoted about "information of interest" suggests that further disclosure requirements, such as those that would have been mandated by Minnesota agency law, survived the new payment for order flow rules.

In the last paragraph of its opinion, the *Dahl* court did briefly allude to a second ground for its preemption holding. Premising its holding on the belief "that order flow payments are a useful competitive tool and that a decision requiring them to be returned to the customer would have a seriously negative impact on the efficacy of this tool," the *Dahl* court refused to make a decision that could have such an impact.[235] The *Dahl* court explicitly deferred to the SEC and Congress on the grounds of the "national import" and of the "possible effect of our decision" on securities markets nationwide.[236] The *Dahl* court reasoned that determining whether the impact of such a decision on the national securities markets would be "positive or negative is not for this court to judge."[237]

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[231] *Id.* at 55,010 n.39.

[232] 17 C.F.R. § 240.10b-10(a)(7)(iii) (2002).

[233] Payment for Order Flow, 59 Fed. Reg. at 55,010.

[234] *Id.*

In *Guice v. Charles Schwab & Co.,*[238] the Court of Appeals of New York took a very similar approach to that of the *Dahl* court. Even the structure of the opinion is similar in that the *Guice* court first acknowledged that "facially, plaintiffs have pleaded actionable claims under New York common law agency principles."[239] The *Guice* court then found two types of conflict to support the conclusion that the state law claims were preempted. The first was that the imposition of "each State's common law agency jurisprudence" would "adversely affect[] the ability of [the SEC] to regulate comprehensively and with uniformity in accordance with the objectives of Congress,"[240] and, therefore, would conflict with the Congressional intent, as expressed in the 1975 amendments to the Exchange Act,[241] to create a uniform, national securities market.[242] Although the *Guice* court did not use this term, it was describing implied conflict in this section of its opinion.[243]

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[235] Dahl v. Charles Schwab & Co., 545 N.W.2d 918, 925-26 (Minn. 1996).

[236] *Dahl*, 545 N.W.2d at 925-26.

[237] *Id.*

[238] 674 N.E.2d 282 (N.Y. 1996). For a more thorough discussion of *Guice*, see Anthony E. Szydlowski, Note, *Preemption in the Securities Industry: A Diminished Standard?*, 74 ST. JOHN'S L. REV. 259 (2000). In the interest of full disclosure, the reader should be aware that Mr. Szydlowski wrote the initial version of his article as one of the Author's students.

[239] *Guice*, 674 N.E.2d at 289.

[240] *Id.* at 290.

[241] For a description of these amendments, see Walter Werner, *Adventure in Social Control of Finance: The National Market System for Securities*, 75 COLUM. L. REV. 1233 (1975).

[242] *Guice*, 674 N.E.2d at 289.

[243] The citations in *Guice* are primarily to United States Supreme Court cases that involve implied conflict preemption. *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (asserting that any state law placing arbitration provisions of contracts on unequal footing was in contravention of Federal Arbitration

The second type of conflict was a "direct[] conflict" between New York state agency law principles and the SEC's rejection of "proposals for more exacting disclosure" in promulgating the new payment for order flow rules.[244] In the *Guice* court's view, the SEC had decided to allow payment for order flow "under its delegated securities industry supervisory powers" and pursuant to a determination that payment for order flow "will further the policies of Congress."[245] In addition, the SEC had acted "*reasonably* within its rule-making authority" in adopting this poli-

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Act); Barnett Bank of Marion County v. Nelson, 517 U.S. 25, 31, 38 (1996) (finding that state banking laws were impliedly preempted by federal banking statutes because state laws forbid the very same activities federal law authorizes); Freightliner Corp. v. Myrick, 514 U.S. 280, 289 (1995) (holding no implied preemption because "it is not impossible . . . to comply with both federal and state law" and because Congress failed to address the subject of state common law claims); Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300, 310 (1988) (explaining intent to preempt "may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States" and finding state law permitting examination of issuance of natural gas was preempted by federal scheme created by Natural Gas Act); Int'l Paper Co. v. Ouellette, 479 U.S. 481, 493–94 (1987) (finding Vermont state law preempted by federal water pollution legislation because state law would interfere with achievement of Congress's purposes and objectives); Cal. Fed. Sav. & Loan Ass'n. v. Guerra, 479 U.S. 272, 292 (1987) (holding petitioner's challenge to California's employment statute "not preempted by Title VII, as amended by the PDA, because it is not inconsistent with the purposes of the federal statute, nor does it require the doing of an act which is unlawful under Title VII"); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 716 (1984) ("[W]hen, as here, a state regulation squarely conflicts with the accomplishment and execution of the full purposes of federal law . . . the balance between state and federal power tips decisively in favor of federal law, and enforcement of the state statute is barred by the Supremacy Clause."); Gordon v. N.Y. Stock Exch., Inc., 422 U.S. 659, 689–90 (1975) (holding that permitting courts to conduct separate antitrust proceedings would conflict with the SEC regulatory scheme and therefore mandated repeal of antitrust laws); Hines v. Davidowitz, 312 U.S. 52, 66 (1941) (affirming supremacy of federal legislation over state law to establish a uniform rule of immigration law stating "where the federal government . . . has enacted a complete scheme . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law"). *But see* Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-53, 158 (1982) (applying express preemption analysis, noting that "[e]ven where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law," and holding language in the federal regulations indicated an intent to preempt state law).

[244] *Guice*, 674 N.E.2d at 238-90.

[245] *Id.*

cy.[246] As state common law agency principles required more disclosure than the new payment for order flow rules, the state standards would "inevitably . . . supplant the disclosure rules of the SEC on the same subject and come to dominate the relationship between broker and customer, since the broker would not be able to avoid civil liability for acceptance of order flow payments merely by complying with Federal regulations."[247]

The *Guice* court evinced the same discomfort that motivated the *Dahl* court to avoid making any determination affecting the relationship between a broker and its customer. The *Guice* court contrasted the "State common-law standards for disclosure," which are "set generally" to the SEC's standards, which are based upon "the policy choices and balancing of the competing legitimate interests of investors, exchange and nonexchange markets, and other participants in the securities industry."[248]

As with the *Dahl* case, *Guice* was an appeal from a motion to dismiss,[249] and there was almost no development of a factual record. Although the holding in *Guice* was less dependent upon factual findings than the holding in *Dahl*, this is due in part to the *Guice* court's failure to specify what exactly would have been required under New York's common law agency principles. If the *Guice* court had engaged in this type of analysis, the conflict would be clearer and the extent to which it rested on unproven factual predicates also would be clearer.

The California Court of Appeal has come to a similar preemption conclusion as the *Dahl* and *Guice* courts with respect to payment for order flow. In subsequent opinions, however, the California courts have been careful to read the payment for order flow cases narrowly.

In *McKey v. Charles Schwab & Co.*,[250] the California Court of Appeal held that implied preemption arose from two conflicts.[251] The first involved the conflict between the pre-

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[246] *Id.* (emphasis added).

[247] *Id.* at 291.

[248] *Id.*

[249] *Guice*, 674 N.E.2d at 284-85.

[250] 79 Cal. Rptr. 2d 213 (Ct. App. 1998)

[251] *McKey*, 79 Cal. Rptr. 2d at 216.

October 1995 Rule 10b-10, which the *McKey* court held was "intended to regulate any and all remuneration received by brokers, no matter what the form."[252] The second was the conflict between the goal of a national market system articulated in the 1975 amendments to the Exchange Act and the differing disclosure standards that each state might impose if the payment for order flow cases were permitted to continue.[253]

In 1999, the California Supreme Court, in *Diamond Multimedia Systems, Inc v. Superior Court,*[254] dealt with what impact the Private Securities Litigation Reform Act of 1995 (PSLRA) should have on a class action brought under antifraud provisions of the California Corporate Securities Law of 1968 and held that the California law was not preempted.[255] Relying in part on a policy argument, the defendant argued that "the civil remedy" provided by the California Corporate Securities Law should be construed "narrowly so that California will not provide a more attractive forum and afford more expansive remedies for market manipulation than does federal securities law."[256] The *Diamond Multimedia* court held that such "policy-based arguments must be addressed to Congress and/or the Legislature" and that "the function of this court is only to construe and apply the law so as to carry out the legislative intent which underlies it."[257]

The dissent in *Diamond Multimedia* relied on the payment for order flow cases to argue that there was an implied conflict between the PSLRA and the California Corporate Securities Law, as the *Diamond Multimedia* majority had construed it.[258] Relying upon the reasoning of the *Guice* opinion, the dissent argued that the PSLRA was "intended by Congress to continue the development of that same national securities market," and that the "fragmentation of the [PSLRA's] express national standard into as many as 50 different state standards would wreak havoc on federal efforts to protect that market from abusive litigation practices."[259] The dissent concluded, therefore, that there was implied conflict preemption of the California Corporate Securities Law.[260] The *Diamond Multimedia* majority, while recognizing that the Securities Litigation Uniform Standards Act of 1998 (SLUSA) might lead to the result that the dissent advocated,[261] held that there was no implied conflict preemption on two grounds. First, the SLUSA specifically provided that its provisions "shall not affect or apply to any action commenced before and pending on the date of the enactment of this Act."[262] Second, in passing the SLUSA, Congress did not limit individual actions, only class actions.[263] "By enacting only a class action limitation, when it could have barred all actions based on state law to recover losses caused by market manipulation, Congress has confirmed the independent force of state securities law."[264]

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[252] *Id.* at 219 n.6. This is similar to the approach in *Dumont v. Charles Schwab & Co.*, 717 So. 2d 1182, 1185-87 (La. Ct. App. 1998), *settlement approved*, 2000 WL 1023231 (E.D. La. July 21, 2000).

[253] *Guice*, 674 N.E.2d at 219. This is the approach of *Guice v. Charles Schwab & Co.*, 674 N.E.2d 282 (N.Y. 1996), which *McKey* cites for this proposition, 79 Cal. Rptr. 2d at 219.

[254] 80 Cal. Rptr. 2d 828 (1999).

[255] *Diamond Multimedia*, 80 Cal. Rptr. 2d at 846.

[256] *Id.* at 833. The specific statutory issue was whether sections 25400 and 25500 afforded a remedy to out-of-state persons who purchased or sold Diamond Multimedia stock, or only to in-state purchasers. *Id.*

[257] *Id.* at 834.

[258] *Id.* at 848 (Brown, J., dissenting). Justice Brown was joined by Justice Chin

A year after the *Diamond Multimedia* decision, a different district and panel of the California Court of Appeal from those involved in *McKey* decided *Roskind v. Morgan Stanley Dean Witter & Co.*,[265] which gave a restricted reading to *McKey* and the other payment for order flow cases. The plaintiff alleged

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in the dissent. *Id.* at 852 (Brown, J., dissenting).

[259] *Id.* at 851 (Brown, J., dissenting).

[260] *Id.* at 848 (Brown, J., dissenting).

[261] *Diamond Multimedia*, 70 Cal. Rptr. 2d at 834 n.12.

[262] Securities Litigation Uniform Standards Act of 1993, Pub. L. No. 105-353, § 101(c), 112 Stat. 3227, 3233 (1998).

[263] *Id.*

[264] *Diamond Multimedia*, 80 Cal. Rptr. 2d at 834 n.12.

[265] 95 Cal. Rptr. 2d 258 (Ct. App. 2000), *reh'g denied*, 80 Cal. App. 4th 1225, *and review denied*, No. 5089019, 2000 Cal. LEXIS 6583 (Aug. 16, 2000), *and cert. denied*, 531 U.S. 1119 (2001), *and removal denied*, No. C-01-541-SC, 2001 U.S. Dist. LEXIS 4528 (N.D. Ca. Apr. 11, 2001). California Court of Appeal decisions from any division have a binding effect on lower California courts; *see* Auto Equity Sales, Inc. v. Superior Court, 369 P.2d 937, 940 (1962). No district of the Court of Appeal is bound to follow any other district's decisions. *See* Greyhound Lines, Inc. v. County of Santa Clara, 187 Cal. Rptr. 702, 704 (Ct. App. 1986).

that, after he had placed an order with the defendant to sell a block of stock, the defendant delayed execution of the plaintiff's order for over an hour and sold its own block of the same stock during the delay, thus "trading ahead" of its customer.[266] The plaintiff alleged that the delay and trading ahead had caused him to lose money.[267] The plaintiff brought a class action on two California state law grounds.[268] First, the plaintiff "alleg[ed] that the practice of trading ahead is an unfair and unlawful business practice under" California's unfair competition law.[269] Second, the plaintiff "alleg[ed] a breach of fiduciary duty by [the defendant] in trading ahead of its clients."[270]

Relying upon the payment for order flow cases, the broker-dealer defendant in *Roskind* argued that applying California law would conflict with the congressional goal of a national market system, and, therefore, California law was impliedly preempted.[271] In contrast, the plaintiff argued that the preemption analysis contained in the payment for order flow cases should be restricted to those circumstances where "the SEC had made a conscious decision to legalize the practice" being challenged.[272] The defendant broker-dealer characterized this as a "narrow" reading of the payment for order flow cases.[273] This "narrow" reading was adopted by the *Roskind* court, which relied upon the fact that "[i]n contrast to the issue of order flow payments, where the SEC has legalized the practice in question as a matter of federal law, there is no SEC rule, NASD rule, or other federal law or regulation allowing the very different practice of trading ahead, which is in issue here."[274]

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[266] *Roskind*, 95 Cal. Rptr. 2d at 259.

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] *Id.* at 260.

[271] *Roskind* Respondent's Brief, *supra* note 2, at 19. The *Roskind* court discussed an unpublished Ninth Circuit opinion, *Shearson Lehman Bros. v. Greenberg*, No. 93-55535, 1995 WL 392028 (9th Cir. July 3, 1995), that, in dictum, indicated that California's unfair competition law was probably preempted by federal securities laws. *Greenberg*, 1995 WL 392028, at *3. The *Roskind* court declined to follow *Greenberg*, describing "the dicta contained in . . . unpublished decisions [of the Ninth Circuit], which may not be cited to the federal courts in the Ninth Circuit, as particularly unpersuasive authority." *Roskind*, 95 Cal. Rptr. 2d at 265. In addition, the *Roskind* court noted a conflict between the narrow approach taken by the *Greenberg* opinion in interpreting section 28(a) of the Exchange Act, to which the dictum had cited and the broader approach taken by the *Diamond Multimedia* opinion and followed the latter, writing that "we also agree with and are bound by the majority of our own Supreme Court in *Diamond Multimedia* that the phrase 'in addition to' [in section 28(a)] discloses a Congressional intent to leave state laws in place, and not to preempt them." *Id.*

[272] Plaintiff-Appellant's Opening Brief at 23, *Roskind* (No. A087546).

B. SLUSA

The SLUSA[275] should be briefly mentioned because the preemption debate on a going forward basis will involve SLUSA claims. In addition, the initial SLUSA cases shed some further light on the federal courts' attitudes toward class actions against widespread broker-dealer practices. Defendants have been quick to label class actions complaining of widespread broker-dealer practices as "covered class actions" that are "based upon the statutory or common law of any state."[276]

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[273] *Roskind* Respondent's Brief, *supra* note 2, at 28 n.16.

[274] *Roskind*, 95 Cal. Rptr. 2d at 263. The *Roskind* court characterized the majority decision in *Diamond Multimedia* as "declin[ing] to follow [*Guice* and *Dahl*] outside the context of order flow payments." *Id.* at 263 n.2.

[275] The SLUSA amended both section 18 of the Securities Act of 1933 and section 28 of the 1934 Act by adding almost identical limitations on remedies. *Compare* 15 U.S.C. § 77p(b)-(f) (Supp. 2003) *with* 15 U.S.C. § 78bb(f) (Supp. 2003). This article will refer only to the SLUSA as it appears in the 1934 Act, as it is the 1934 Act that is most relevant to the types of widespread broker-dealer practices discussed herein.

[276] 15 U.S.C. § 78bb(f)(1). *See generally* Dennis J. Block & Jonathan M. Hoff, *SLUSA Preclusion of Claims Against Brokers*, N.Y.L.J., April 25, 2002, at 5 (describing the application of the SLUSA in "three class action lawsuits alleging various breaches of broker fiduciary duties stemming from purported analyst bias"). A "covered class action" is defined in the SLUSA as:

> (i) any single lawsuit in which—
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> (I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or
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> (II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over

If a "covered class action" based upon such law alleges "(A) a misrepresentation or omission of material fact in connection with the purchase or sale of a covered security; or (B) that a defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security," the class action "may [not] be maintained in any State or Federal Court by any private party."[277] In effect, Congress intended the SLUSA to preempt certain state law claims.[278]

1. SLUSA Jurisprudence to Date

The courts have been much more hesitant in using the SLUSA to restrain challenges to broker-dealer practices than they have been in *Press*, payment for order flow and NBBO cases. To date, the case law has developed almost entirely on the district court level. The courts that have not applied the SLUSA have usually given one of three rationales: the claim against the broker-dealer did not arise "in connection with the purchase or sale of a covered security,"[279] the defendants did not act with scienter[280] or the SLUSA was intended to protect

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> any questions affecting only individual persons or members; or
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> (ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—
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> (I) damages are sought on behalf of more than 50 persons; and
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> (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

15 U.S.C. § 78bb(f)(5)(B).

[277] *Id.* § 78bb(f)(1). If the action is brought in a state court, it is removable to federal district court. *Id.* § 78bb(f)(2). The congressional intent behind subsection (f)(2) was to "prevent a State court from inadvertently, improperly, or otherwise maintaining jurisdiction over an action that is preempted pursuant to" subsection(f)(1). H.R. Rep. No. 105-640, at 16 (1998).

[278] MICHAEL A. PERINO, SECURITIES LITIGATION AFTER THE REFORM ACT § 11.03 (2002).

[279] *See, e.g.*, Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 01 Civ. 3013, 2001 WL 1182927, at *5 (S.D.N.Y. Oct. 9, 2001); Gutierrez v. Deloitte & Touche, L.L.P., 147 F. Supp. 2d 584, 592-95 (W.D. Tex. 2001); Gordon v. Buntrock, No. 00 CV 303, 2000 WL 556763, at *3 (N.D. Ill. Apr. 28, 2000); Hines v. ESC Strategic Funds, Inc., No. 3:99-0530, 1999 WL 1705503. at *5-6 (M.D. Tenn. Sept. 17, 1999) (one of six causes of action not preempted on this ground).

[280] *See, e.g.*, Martino-Catt v. E.I. duPont de Nemours and Co., 213 F.R.D. 308,

issuers of securities and not broker-dealers.[281] The last rationale has been proffered by many plaintiffs[282] but adopted only by a handful of courts.[283] The first two rationales, both involving traditional elements of Rule 10b-5 actions, are the ones upon which most cases involving broker-dealer practices have turned.

In part, plaintiffs have succeeded in avoiding the application of the SLUSA by careful pleading. For example, plaintiffs have explicitly restricted their complaints "to damages caused by the holding of securities and the loss of value which resulted from such holding."[284] As the complaint is limited to the period after the purchase(s) and before any sale(s), there has been, in the language of section 25(f)(1), no "misrepresentation or omission of a material fact" and no "manipulative or deception device or contrivance" in either case "in connection with the purchase or sale of a covered security."[285] The courts, in grappling with the coverage of the SLUSA, have not written opinions that are models of clarity.

Particularly puzzling are the *Green v. Ameritrade, Inc.*[286] and *Burns v. Prudential Securities*[287] opinions (*Green* relied upon *Burns* in coming to its holding.[288]). Although the result seems correct in both cases, the reasoning in both cases is ob-

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321-23 (S.D. Iowa 2003); Burns v. Prudential Sec., 116 F. Supp. 2d 917, 925-26 (N.D. Ohio 2000).

[281] *See, e.g., Gutierrez,* 147 F. Supp. 2d at 589-91 (positing that Congress may have intended SLUSA to apply only to "issuers of publicly traded stock" because such companies "cannot control where their securities are traded after an initial public offering" and, therefore, "cannot choose to avoid jurisdictions which present unreasonable litigation costs").

[282] *See, e.g., id.*

[283] *See supra* note 281 and the cases cited therein.

[284] *Gordon,* 2000 WL 556763, at *3; *see also Hines,* 1999 WL 1705503, at *6 (holding on one count that "[b]ecause Plaintiff has alleged that the defendants' breach of their fiduciary duties resulted from their actions after she purchased her shares, Plaintiff's post-sale allegations are sufficient to withstand a motion to dismiss").

[285] 15 U.S.C. § 78bb(f)(1) (Supp. 2003).

[286] 120 F. Supp. 2d 795 (D. Neb. 2000).

[287] 116 F. Supp. 2d 917 (N.D. Ohio 2000).

[288] *See* Green v. Ameritrade Inc., 120 F. Supp. 2d 795, 799 (D. Neb. 2000) (citing Burns v. Prudential Securities, 116 F. Supp. 2d 917 (N.D. Ohio 2000)).

scure at best. The courts' argument starts with the straightforward proposition that the language of subsections 28(f)(1)(A) and (B) of the SLUSA are modeled on section 10(b) and Rule 10b-5, and, therefore, cases involving section 10(b) and Rule 10b-5 are helpful in construing section 28(f).[289] The courts then note that one required element of a successful section 10(b) claim is scienter on the part of the defendant.[290] The next step is to require that all covered class actions under section 28(f)(1), must depend upon proving that the defendant acted with section 10(b) scienter. If there is no such allegation, removal to federal court should not be allowed, and the case should be sent back to state court.[291] This type of reasoning leads the defendant to argue that it had scienter.[292] Presumably, the defendants both want their cake and to eat it also. After establishing that all the elements of a section 10(b) claim have been met, they then ask for dismissal under the SLUSA because the claim has been brought under state law. It would be helpful if the *Green* and *Burns* opinions had been clearer on the fact that they were concerned with what types of claims were properly included within section 28(f)(1), and that only claims that were really section 10(b) claims were included within section 28(f)(1).

The best way to understand cases such as *Green* and *Burns* is to not focus on their discussions of the particular elements of a section 10(b) action and whether the plaintiffs' complaints met all these elements. Rather, it is helpful to step back and ask the question that Judge Debevoise formulated: "[H]as [the plaintiff] pleaded what are, in essence, securities fraud claims, even though they were framed as state law claims [?]"[293]

The stakes are high in the SLUSA cases. A court will dismiss a class action that falls under section 28(f)(1) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[294] In theory, a dismissal pursuant to Rule 12(b)(6) is "with prejudice unless the order explicitly states otherwise . . . [and] has a claim preclusive effect."[295] The generous grant of rights to amend a complaint by federal courts, even after dismissal, helps mitigate this effect.[296] Some courts have carefully fashioned their relief, explicitly allowing plaintiffs whose complaint is subject to dismissal pursuant to the SLUSA to amend their complaint even when the plaintiff does not seem to have explicitly moved for such an amendment.[297]

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[289] *Green*, 120 F. Supp. 2d at 798; *Burns*, 116 F. Supp. 2d at 923.

[290] *Green*, 120 F. Supp. 2d at 798; *Burns*, 116 F. Supp. 2d at 923.

[291] *Green*, 120 F. Supp. 2d at 799; *Burns*, 116 F. Supp. 2d at 926.

[292] *See, e.g.*, *Burns*, 116 F. Supp. 2d at 923, 925.

[293] Prager v. Knight/Trimark Group, Inc., 124 F. Supp. 2d 229, 235 (D.N.J. 2000).

[294] *See, e.g.*, *Burns*, 116 F. Supp. 2d at 920 n.1. Rule 12(b)(6) provides that:

2. The SLUSA Paradox

Perhaps we should not be too surprised at the courts' hesitancy in applying the SLUSA in the broadest way to exclude class actions based on state law claims. This result is compatible with Professors Bainbridge and Gulati's explanation of judicial heuristics in deciding securities lawsuits.[298] Insofar as a case is remanded to state court, the federal court will have removed the case from its docket. This result is less compatible with an explanation that places significant weight on judicial hostility to securities class actions.

In addition, at the very heart of the SLUSA lies a paradox. Much of the federal jurisprudence on broker-dealer/customer relationships, both in the federal courts and in the SEC's ad-

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> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defense may at the option of the pleader be made by motion:
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> . . .
>
> (6) failure to state a claim upon which relief can be granted.

Fed. R. Civ. P. 12(b)(6).

[295] 2-12 MOORE'S FEDERAL PRACTICE § 12.34(6)(a) (2002) (footnote omitted).

[296] *See, e.g.*, Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991) ("It is the usual practice upon granting a motion to dismiss [pursuant to Rule 12(b)(6)] to allow leave to replead . . . . Although leave to replead is within the discretion of the district court, refusal to grant it without any justifying reason is an abuse of discretion . . . .") (citation omitted).

[297] *See, e.g.*, *Prager*, 124 F. Supp. 2d at 235 (giving the plaintiff twenty days to amend complaint so that it complies with the PSLRA before dismissing the complaint pursuant to the SLUSA).

[298] *See supra* text accompanying notes 4-8 for a brief description of their views.

ministrative proceedings and rulemaking, has its roots in traditional state law concepts. This is true both of the private cause of action under section 10(b) and Rule 10b-5, which is explored below in this Part, and the particular duties a broker-dealer owes to its customers, which is explored in Part IV below. Although there are, of course, many differences between federal and state causes of action for securities fraud, the basic theories upon which they rest are often quite congruent.

The development of the private cause of action for a violation of section 10(b) and Rule 10b-5 shows this congruity. Although current Supreme Court jurisprudence looks to Congressional intent to determine if a private cause of action should be implied under a federal statutory provision,[299] most of the earliest cases that implied a private cause of action under section 10(b) and Rule 10b-5 were based on a common law tort principle. These cases "relied on the common-law tort concept that an actor is civilly liable for damages flowing from his or her violation of a criminal statute designed to protect another's interest, if that interest is invaded."[300] In addition, the substance of section 10(b), at least as construed by the courts,[301] is in many ways a codification on the federal level of state common law of deceit.[302]

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[299] *See, e.g.,* Transamerica Mortgage Advisers, Inc. v. Lewis, 444 U.S. 11, 18-19 (1979) (relying on Congressional intent in holding that there is a private right of action under section 20(b) of the Investment Advisor Act of 1940). *See generally* 5B ARNOLD S. JACOBS, DISCLOSURE AND REMEDIES UNDER THE SECURITIES LAWS, § 6:15 (2002) ("As a consequence of this line of cases [culminating in *Transamerica*], it is probable that the legislative intent to create or to deny such an implied right of action is controlling.").

[300] Jacobs, *supra* note 299, § 6.16. *Kardon v. National Gypsum Co.*, 69 F. Supp. 512, 514 (E.D. Pa. 1946), is the earliest case in which a court held that there was a private cause of action under section 10(b). In doing so, the *Kardon* court relied upon section 286 of the Restatement (First) of Torts and the principle that, in certain circumstances, "'violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another.'" *Id.* at 513 (quoting RESTATEMENT (FIRST) OF TORTS § 286).

[301] *See* Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 386-87, 460 (1990) (arguing that the Supreme Court has interpreted section 10(b) to "proscribe[] knowing and intentional misconduct designed to deceive or defraud investors" but that Congress intended the 1934 Act to control speculation, that the SEC was given "extraordinary powers to achieve this control" and that section 10(b) was meant to give the SEC such powers in areas outside of the 1934 "Act's [other] narrowly defined grants of rulemaking power").

IV. THE NBBO CASE

Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,[303] the NBBO case in the Third Circuit, has developed over a five year period in protracted litigation that has featured a number of important opinions on the types of substantive claims that courts will entertain against broker-dealers as well as the types of substantive claims that meet the procedural requirements for class certification.

The initial district court and Third Circuit opinions rejected the plaintiffs' claims under section 10(b) and Rule 10b-5, "hold[ing] that, where defendants are under no affirmative legal duty to disclose their order execution practices and those practices are widely followed within the securities industry, as a matter of law there is no scienter when defendants fail to disclose their practices."[304] *Newton* involved an allegation that the defendant broker-dealers had failed in their duty of best execution for customers by executing customer trades in the over-the-counter market[305] at the NBBO.[306] There was no factual dispute as to the prices realized. Both sides "agree[d] that all the transactions in question here were executed by defendants, either as agents or principals, at prices that were equivalent to the NBBO at the time of each transaction."[307]

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[302] 7 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 3410-21 (Rev. 3d ed. 2003). Although the courts have often stated that fraud under section 10(b) is not co-extensive with common law deceit and can cover additional factual patterns, "[h]ow much further the [federal securities law] statutes go is difficult to say definitely." *Id.* at 3419-20. In turn, the "extent [that] the SEC Acts go beyond common law fraud depends upon the particular common law jurisdiction." *Id.* at 3421.

[303] 135 F.3d 266 (3d Cir. 1998).

[304] Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,480, at 97,226 (3d Cir. June 19, 1997), *vacated and withdrawn*, 115 F.3d 1135 (3d Cir. 1997).

[305] Since the 1980s market activity has increasingly shifted towards the over-the-counter (OTC) market. *See* Order Exempting Options Specialists From Section 11(b) of the Securities Exchange Act of 1934 When Accepting Certain Types of Complex Orders, Exchange Act Release No. 34-47,319, 68 Fed. Reg. 7156, 7158 n.20 (Feb. 12, 2003). Trading in the OTC market consists of stocks that are not listed on a securities exchange, as well as trading in exchange-listed securities off of an exchange. *See* Order Execution Obligations, Exchange Act Release No. 34-37, 619A, 61 Fed. Reg. 48,290, 48,291 (Sept. 12, 1996). The market for trading exchange-listed securities off of an exchange is sometimes known as the "third market." *Id.* at 48,291. Quotations for most securities traded in the OTC market

The plaintiffs alleged that the defendants had an obligation to disclose both that they were not executing their customers' orders at the "best available price" and that they were "secretly accru[ing] profits for themselves" from their order execution practices.[308] In the plaintiffs' view, the defendants' had violated section 10(b) and Rule 10b-5 because they had "fail[ed] to disclose material facts about their conflict of interest and execution practices." In turn, these failures "were actionable misrepresentations because of Defendants' fiduciary and agency relationship to Plaintiffs and because

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are listed in the National Association of Securities Dealers Automated Quotation (NASDAQ) system. 5 LOSS & SELIGMAN, at 2605-35. NASDAQ allows quotations to be instantaneously updated and viewed through the system. *See id.* Securities that are not listed on either NASDAQ or an exchange are listed on NASD's OTC Bulletin Board (OTCBB). Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Operation of the OTC Bulletin Board, Exchange Act Release No 34-39,632, 63 Fed. Reg. 7846, 7846 (Feb. 17, 1998). The OTCBB supports the market making activities of NASD members by allowing them to enter and update quotations in real-time. *See* Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Notice of Filing and Order Granting Accelerated Approval of Amendment Nos. 3 and 4 to Proposed Rule Change Relating to the OTC Bulletin Board Service, Exchange Act Release No. 34-38,456, 62 Fed. Reg. 16,635, 16,636 (April 7, 1997).

[306] *In re* Merrill Lynch Sec. Litig., 911 F. Supp. 754, 756-57 (D.N.J. 1995), *rev'd sub nom.*, Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266 (3d Cir. 1998).

[307] *In re Merrill Lynch Sec. Litig.*, 911 F. Supp. at 757. The NBBO is a computer system that makes available instantaneously the best bid and offer available in the nation. 5 LOSS & SELIGMAN, *supra* note 302, 2105-35. The quotation for a security provided by the NBBO represents a consolidation of the best bids and best offers of every market in which the security is traded. *See* Order Execution Obligations, 61 Fed. Reg. at 48,306. The automated execution systems of most of the regional exchanges are programmed to ensure that customer orders are executed at the NBBO or better. Order Execution Obligations, Exchange Act Release No. 34-36,310, 60 Fed. Reg. 52,792, 52,794 n.11 (Oct. 10, 1995). The availability of the NBBO helps to further the Congressional goal of making quotation information publicly available since such information is "essential information about the condition of the market." *See* Order Execution Obligations, 61 Fed. Reg. at 48,307.

[308] *In re Merrill Lynch Sec. Litig.*, 911 F. Supp. at 757.

Defendants' omissions rendered their implied-in-law representation of fair dealing materially false and misleading."[309]

The plaintiffs alleged that the defendants had used four fraudulent devices. First, the plaintiffs alleged that the defendants had an obligation, when acting as principals,[310] to use other available sources of quotations,[311] as well as the NBBO, in establishing prices to customers.[312] In addition, the plaintiffs alleged that there were other methods that the defendants could have used in executing customer orders that would have led to better prices for customers. The defendants failed "to cross in-house market orders," "to cross customers' market orders with in-house limit orders" and "to cross customers' market orders with SOES limit orders."[313] Finally, the plaintiffs alleged that the defendants had received payments for order flow, which allegedly had led the defendants to "route[ ] plaintiffs' market orders to other brokers who failed to execute them at the best available price."[314]

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[309] Brief for Appellants at 22, Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266 (3d Cir. 1998) (No. 96-5045).

[310] Dealers in OTC securities are known as "market makers." 5 LOSS & SELIGMAN, *supra* note 302, at 2605-35. A market maker generally engages only in principal transactions for its own account. SEC Approves Rule Change to NASD Trade-Reporting Rules for Riskless Principal Transaction in NASDAQ and OTC Securities, NASD Notice 99-65, 1999 WL 33176566, at *2 (Aug. 6, 1999). Therefore, a customer transaction in the OTC market generally involves two transactions by a market maker, in which the market maker profits from the spread: first, a transaction between the market maker and another market participant, and, second, a transaction between the market maker and the customer. *Id.*

[311] The plaintiffs were referring to electronic communication networks (ECNs) such as SelectNet and Instinet. Among ECNs involved in the NASDAQ market, SelectNet and Instinet are generally regarded as the most significant. Order Execution Obligations, 61 Fed. Reg. at 48,308. An ECN is a system that allows market makers to electronically enter orders into the system, publicizes those orders so that other market participants can view them and allows those participants to execute a trade at the stated price. Adoption of Amendments to the Intermarket Trading System Plan to Expand the ITS/Computer Assisted Executed System Linkage to All Listed Securities, Exchange Act Release No. 34-42,212, 64 Fed. Reg. 70,297, 70,302 n.78 (Dec. 16, 1999). Prior to 1996, when the SEC began to require market makers to include the quotes that they displayed on ECNs in their public quotes, *see* Order Execution Obligations, 61 Fed. Reg. at 48,290, ECNs contributed to the maintenance of artificially wide spreads in the OTC market, *id.* at 48,308. This occurred because market makers generally displayed bids and offers on ECNs at better prices than those that they publicly posted on NASDAQ. *Id.* A market maker could engage in trading on ECNs without adjusting the quotes that they made available on NASDAQ to reflect the more favorable prices. *Id.* The 1996 rule change was intended to curb the anti-competitive effects that this practice was having on public quotations. *See* Order Execution Obligations, 60 Fed. Reg. at 52,799.

[312] *In re Merrill Lynch Sec. Litig.*, 911 F. Supp. at 756-57.

Judge Debevoise's district court opinion in *Merrill Lynch* is a thoughtful and full examination of the legal issues. As a preliminary matter, he noted that "[t]he central issue in this case is precisely what is entailed by the duty of best execution."[315]

A. *The Common Law Roots of the Duty of Best Execution*

Although a broker-dealer's duty of best execution can be located in federal common law, SRO regulations or state common law, ultimately the root of the first two doctrines lies in state law. The common law duty of best execution is a particular manifestation of a broker's more general duties as an agent to its customers.[316] The duty of best execution may be characterized as either a fiduciary one or as a more limited duty due with respect only to a particular purchase or sale.[317] Even in jurisdictions where a broker is not a fiduciary, however, the courts require a broker as an agent to give best execution to its customers.[318]

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[313] *Id.* at 757. Where a broker-dealer has both an order to buy and an order to sell a particular security, it may execute those orders against each other at a given price. SEC, REPORT: PRACTICE OF PREFERENCING (April 1997). This practice is known as crossing orders. *See id.* Although a cross trade may be executed at, between or outside of the currently prevailing quotation for the security, most occur between the quote. *Id.* Customer limit orders entered into NASD's Small Order Execution System (SOES) could be crossed pursuant to SOES limit order facility. *See* Self-Regulatory Organizations; Notice of Filing and Order Granting Partial Accelerated Approval Of Proposed Rule Change by National Association of Securities Dealers, Inc., Relating to Actions Taken During Extraordinary Market Conditions, Exchange Act Release No. 34-36,115, 60 Fed. Reg. 44,095, 44,095 (Aug. 24, 1995). If the order could not be immediately executed, it was placed in SOES limit order file. Self-Regulatory Organization; National Associations of Securities Dealers, Inc; Order Granting Partial Approval and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 1 to Proposed Rule Change Relating to Implementation of the Commission's Order Handling Rules, Exchange Act Release No. 34-38,156, 62 Fed. Reg. 2415, 2417 (Jan. 16, 1997). The limit order would later be executed automatically if the best bid or offer became equal to the limit order price. *Id.* In 1997, the SEC approved an NASD proposal to eliminate the SOES limit order file, finding it to be incompatible with the limit order display rule. *Id.* at 2427-28.

[314] *In re Merrill Lynch Sec. Litig.*, 911 F. Supp. at 758. See *supra* text accompanying notes 182-97 for a description of payment for order flow.

[315] *In re Merrill Lynch Sec. Litig.*, 911 F. Supp. at 760.

[316] NORMAN POSER, BROKER-DEALER LAW & REGULATION § 2.03[A], at 2-56 (3d

One well known treatise has summarized the common law duty of best execution as consisting of three things: "the duty to execute promptly; the duty to execute in an appropriate market; and the duty to obtain the best price."[319] One of the significant differences between the state and federal duties of best execution is that, at least with respect to a breach of a broker's state law duty of loyalty, some states do not require a showing of the broker's intent to deceive (scienter in the federal scheme).[320]

The federal duty of best execution can be located (1) in the shingle theory and its implied duties arising from the professional status of a broker; (2) in the federal fiduciary duty owed to a customer by a broker that develops a relationship of trust and confidence with the customer[321] or (3) in the federal fiduciary duty owned to a customer by a broker who acts as an agent in executing the customer's order.[322] It should be noted

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ed. 2001).

[317] *See, e.g.,* Index Futures Group v. Ross, 557 N.E.2d 344, 348-49 (Ill. App. Ct.), *appeal denied*, 561 N.E.2d 557 (Ill. 1990); Berki v. Reynolds Sec., Inc., 560 P.2d 282, 286 (Or. 1977).

[318] Poser, *supra* note 316, § 2.03[B], at 2-58.

[319] *Id.*

[320] *Compare Index Futures*, 557 N.E.2d at 349-50 (under Illinois Law, "a breach of the fiduciary duty of loyalty owed to a principal by his or her agent" does not "'require[] []either actual dishonesty [] or intent to deceive'" (quoting *In re* Estate of Neprozatis, 378 N.E.2d 1345, 1349 (Ill. App. Ct. 1978))) *with* Flickinger v. Harold C. Brown & Co., 947 F.2d 595, 599 (2d Cir. 1991) (applying New York Law and holding that "[a]n action for breach of fiduciary duty . . . requires a showing of 'deceitful intent' on the part of the fiduciary" (quoting Horn v. 440 East 57th Co., 547 N.Y.S.2d 1, 5 (App. Div. 1989))). *Flickinger's* reliance upon *Horn* has been criticized by Professor Poser, *supra* note 316, § 2.03[A], at 2-50 n.266.

[321] David A. Lipton, *Best Execution: The National Market System's Missing Ingredient*, 57 NOTRE DAME L. REV. 449, 464 (1982) [hereinafter Lipton, *Best Execution*]. For a general overview of these two theories, see DAVID A. LIPTON, BROKER-DEALER REGULATION 5-2 to 5-24, 5-34 to 5-44 (2001) [hereinafter LIPTON, BROKER-DEALER REGULATION] (shingle theory and fiduciary theory).

[322] *See* Randall W. Quinn, *Deja Vu All Over Again: The SEC's Return to Agen-*

that these three theories are the underpinnings for many federal duties to which broker-dealers are held, not just the duty of best execution.[323]

Although the first two theories are often applied indiscriminately by particular courts, they are conceptually distinct in that the fiduciary trust and confidence theory focuses on the particular relationship between a broker and its customer, while the shingle theory applies regardless of the particular relationship.[324] Adding to the confusion is the fact that courts often do not explicitly identify the theory that they are applying.[325] Neither theory requires a principal-agent relationship between the customer and his/her broker.[326]

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cy Theory in Regulating Broker-Dealers, 1990 COLUM. BUS. L. REV. 61, 76-78 (1990).

[323] LIPTON, BROKER-DEALER REGULATION, *supra* note 321, at 5-22 to 5-25 ("The fact pattern in which the shingle theory was developed involved brokers charging customers excessive mark-ups in transactions effected in a principal capacity . . . . From these origins, the application of the shingle theory has been greatly expanded to cover a broad range of broker misdeeds."); *id.* at 5-43 ("While the fiduciary theory was initially applied in a fact pattern involving the failure of a broker to disclose its purchase price of securities sold to customers, as with the shingle theory, the application of the fiduciary theory has been expanded to cover other broker misdeeds." (footnote omitted)).

[324] Lipton, *Best Execution*, *supra* note 321, at 464.

[325] As to the shingle theory, "[w]hile commentators commonly refer to these duties by the terms 'shingle' or 'misrepresentation' theory, these duties are less frequently referred to by these terms in reported SEC and judicial decisions." LIPTON, BROKER-DEALER REGULATION, *supra* note 321, at 5-3 (footnote omitted). The lack of identification of fiduciary theory as the basis for liability arises in part from the courts discomfort with applying fiduciary principles in light of *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977). *Santa Fe* stands for the general proposition that a breach of fiduciary duty "without any deception, misrepresentation, or nondisclosure" does not violate the 1934 Act. *Santa Fe*, 430 U.S. at 476. "When a judicial opinion either ignores or does not acknowledge the fiduciary duty underpinnings of a broker-dealer misdeed, the application of the *Santa Fe* limitations on Rule 10b-5 . . . would not be either apparent or appropriate." LIPTON, BROKER-DEALER REGULATION, *supra* note 321, at 5-52.4.

[326] *See* Norris & Hirshberg, Inc. v. SEC, 177 F.2d 228, 231 (D.C. Cir. 1949) (even where broker acted as a principal for itself in securities trades, it could be sanctioned by the SEC when it took advantage of customers who reposed, "faith and trust" in broker) (fiduciary theory); Charles Hughes & Co. v. SEC, 139 F.2d 434, 437 (2d Cir. 1943) ("Even considering petitioner [broker] as a principal in a simple vendor-purchaser transaction . . . it was still under a special duty, in view of its expert knowledge and proffered advice, not to take advantage of its customers' ignorance of market conditions.") (shingle theory).

The third theory is one that had been used only infrequently by the SEC.[327] Unlike the fiduciary trust and confidence theory, the fiduciary agency theory does not require more than an agent/principal relationship.[328]

Commentators have traditionally distinguished the shingle theory and the federal fiduciary trust and confidence theory on the basis that the duties arising under the shingle theory may be traced to "the fact that brokers are registered pursuant to legislation which is designed to protect the investing public,"[329] while the duties arising under the federal fiduciary theory are transpositions of common law fiduciary duties.[330] In fact, Professor Louis Loss, who invented the term "shingle theory," stated that "[t]his [theory] has nothing to do with any agency" theory.[331] While this distinction seems clear in theory, in practice the SEC and the courts have tended to meld the two dominant theories.[332] Even if the shingle theory is conceptualized as a separate theory, one needs to recognize that it is only an "extension of the common law doctrine of 'holding out.'"[333]

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[327] Quinn, *supra* note 322, at 71, 76-78.

[328] As Randall Quinn has explained the difference:

> The distinction between the two theories is as follows. Anytime the evidence shows an explicit creation of an agency relationship, for example an agreement to purchase securities "for" the customer, there necessarily is a relationship of trust and confidence as to matters within the scope of the agency. The trust and confidence theory is properly invoked in the absence of an explicit creation of an agency relationship. This distinction probably has little practical significance, however, because it is unlikely that a case would arise where the results would be different depending on whether or not trust and confidence or agency is used as the basis for disciplinary action.

Id. at 79 n.111.

[329] LIPTON, BROKER-DEALER REGULATION, *supra* note 321, at 5-7.

[330] POSER, *supra* note 316, § 2.01[A], at 2-6.

[331] Louis Loss, *The SEC and the Broker-Dealer*, 1 VAND. L. REV. 516, 518 (1948).

[332] Roberta S. Karmel, *Is the Shingle Theory Dead?*, 52 WASH. & LEE L. REV. 1271, 1296 (1995) ("At bottom, the shingle theory rests on the premise that a broker-dealer has fiduciary obligations to its customers."); *accord* Cheryl Goss Weiss, *A Review of the Historic Foundations of Broker-Dealer Liability for Breach of Fiduciary Duty*, 23 J. CORP. LAW 65, 89 (1997) ("[O]ften accompanying the 'implied representation' contract language of the [shingle theory] opinions is language implying fiduciary responsibilities, including equitable concepts of unequal relationship, trust and confidence, and full disclosure.").

B. The NBBO Case on Best Execution

The parties disagreed about the significance of the SEC's proposed rules on order execution obligations in the OTC[334] markets, which became final rules in 1996,[335] after Judge Debevoise's opinion. The defendants argued that the SEC commentary accompanying the proposed rules indicated that executions in OTC securities at the NBBO prior to the effectiveness of the new rules met best execution obligations and that only on a going forward basis was there any issue involving the relevance of the NBBO.[336] In addition, the defendants argued that there was a conflict between the relief sought by the plaintiffs and both the SEC's proposed rule and a NASD proposal to modify the method by which it executed small retail orders.[337]

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[333] 3 THOMAS L. HAZEN, THE LAW OF SECURITIES REGULATION § 14.15, at 258 (Practitioner's ed., 4th ed. 2002).

[334] Order Execution Obligations, Exchange Act Release No. 34-36,310 (Oct. 6, 1995), 60 Fed. Reg. 52,792 (Oct. 10, 1995).

[335] Order Execution Obligations, Exchange Act Release No. 34-37,619A, 61 Fed. Reg. 48,290 (Sept. 12, 1996).

[336] Defendant Painewebber's Supplemental Brief in Support of Motion for Summary Judgment at 14-15, *In re* Merrill Lynch Sec. Litig., 911 F. Supp. 754 (D.N.J. 1995) (No. 94-5343) [hereinafter Painewebber's Supplemental Brief]. On this point, one of the other defendants relied upon the Painewebber brief. Defendant Dean Witter Reynolds Inc.'s Supplemental Memorandum in Support of Defendants' Motion for Summary Judgment at 4, *In re Merrill Lynch Sec. Litig.*, (No. 94-5343). The remaining defendant, Merrill Lynch, made the same substantive point but did not discuss the proposed rule or cite to the Painewebber brief. Defendant Merrill Lynch's Supplemental Brief in Support of Motion for Summary Judgment at 7-12, *In re Merrill Lynch Sec. Litig.* (No. 94-5343).

[337] Painewebber's Supplemental Brief, *supra* note 336, at 16-17. NASD's Small Order Execution System (SOES) is an automated trading system. Order Execution Obligations, 61 Fed. Reg. at 48,294. It was intended to handle relatively small orders from retail customers. Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Accelerated Temporary Approval of Proposed Rule Change To Extend Certain SOES Rules Through January 31, 1997, Exchange Act Release No. 34-37,502, 61 Fed. Reg. 40,869, 40,870 (Aug. 6, 1996). SOES succeeded in providing retail investors with greater access to the NASDAQ market by providing retail investors with greater access to the NASDAQ market by providing a readily available medium to execute small trades. *Id.* The system executes orders immediately at the best bid or offer against an assigned market maker. Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Temporary Approval and Notice of Filing and Order Grant-

The defendants argued that, under either the SEC's proposed rule or the new NASD order execution system, a broker-dealer could still satisfy its order execution obligations by execution at the NBBO, although the NBBO would now include additional pricing information.[338] "Thus, the SEC initiative would impose a new obligation on the firm that enters quotations, *not* on the firm that accepts an order for execution: in general *that* firm still would provide an execution at the NBBO."[339] The defendants never used the legal doctrine of preemption, although their conflict language certainly is remi-

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ing Accelerated Approval of Amendment No. 2 of Proposed Rule Change to Extend the Interim SOES Rules, Exchange Act Release No. 34-35,275, 60 Fed. Reg. 6327, 6329 (Feb. 1, 1995). In 1995, NASD proposed to replace SOES with NAqcess. *See* Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to NAqcess System and Accompanying Rules of Fair Practice, Exchange Act Release No 34-36,548, 60 Fed. Reg. 63,092, 63,093 (Dec. 8, 1995). This proposed change was intended to "assist investors in achieving prompt, efficient executions of their small orders and to provide an opportunity for price improvement over the dealer quotation within an automated execution environment." *Id.* at 63,098. To further this goal, NAqcess would have permitted small customer orders to be executed at prices better than the best market maker's quotation by allowing customer orders to be executed against each other without the assistance of a market maker. *Id.* at 63,093.

NASD's Naqcess proposal failed to obtain approval by the SEC; instead, SOES was reconfigured and became the NASDAQ National Market Execution System (NNMS) in July 2001. Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend a Pilot That Permits SuperSOES to Trade Through the Quotations of UTP Exchanges That Do Not Participate in the NASDAQ National Market Execution Service, Exchange Act Release No. 34-46,757, 67 Fed. Reg. 67,881, 67,882 (Nov. 7, 2002). Additionally, the NNMS was supplemented with a newer automated execution system, called "SuperSOES." *See id.* The NASD intended for SuperSOES to be a more comprehensive system than SOES, and, thus, removed all size and capacity limits from the system so that all NASDAQ orders could be executed through SuperSOES. *Id.* In late 2002, the NNMS was again updated to include the functions of SOES, SuperSOES, and SelectNet and became known as "SuperMontage." *See* Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Establish Maximum Execution Fees and Liquidity Provider Rebates for SuperMontage Transactions in Low-Priced Securities, Exchange Act Release No. 34-46,648, 67 Fed. Reg. 64,439, 64,439 (Oct. 18, 2002).

[338] Painewebber's Supplemental Brief, *supra* note 336, at 16-17.

[339] *Id.* at 16.

niscent of preemption. Preemption was not directly relevant because the plaintiffs only sought damages for the class period, not an injunction to halt future executions at the NBBO.[340]

Similarly, in adopting both the defendants' interpretation of the SEC proposed rule[341] and their conclusion that was based on the interpretation, Judge Debevoise never used the doctrine of preemption. Rather, he used the facts that the SEC "has considered all the relevant commercial, technical, and legal factors" and that the SEC has expertise in this area to conclude that it would be "inappropriate for courts to interfere with [the SEC's congressionally granted] mandate except under extraordinary circumstances."[342] Congress created a "comprehensive scheme . . . to regulate the securities industry," and "the judiciary should not be used as a method to bypass that scheme."[343] As with the language used by the defendants in their analysis, the language Judge Debevoise used also suggests preemption, although field preemption rather than conflict preemption. But instead of applying a preemption analysis, Judge Debevoise fashioned a doctrine of judicial restraint when examining practices in the securities industry, finding no role for the courts "except under extraordinary circumstances."[344] One of the most telling things about Judge Debevoise's opinion is that there was no need for him to have gone so far. He could have relied on the narrower grounds that the defendants lacked scienter and failed to misrepresent.

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[340] *Id.*; *see also* Memorandum of Law in Support of Defendants' Motion to Dismiss the Amended Complaint at 2, *In re Merrill Lynch Sec. Litig.* (No. 94-5343) ("The complaint apparently seeks rescission, or at least rescissory [sic] damages, for *every* such trade [in the two-year class period], including a return of all commissions received by the three firms over this two-year period.").

[341] In arriving at his holding, Judge Debevoise mentioned the NASD proposal but only discussed the SEC proposed rule in detail. *See In re* Merrill Lynch Sec. Litig., 911 F. Supp. 754, 773-74 (D.N.J. 1995), *rev'd en banc*, Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266 (3d Cir. 1998).

[342] *In re Merrill Lynch Sec. Litig.*, 911 F. Supp. at 773.

[343] *Id.* at 774. Judge Debevoise's holding was "that defendants cannot have misrepresented material facts by following existing practices and that defendants cannot have acted with scienter when only now the regulatory agencies are exploring and adopting regulations designed to meet a continually evolving market." *Id.* A misrepresentation or omission of a material fact and scienter are, of course, two of the elements necessary for a violation of section 10(b) and Rule 10b-5.

[344] *Id.* at 773.

The three judge panel of the Third Circuit that decided the initial appeal of *Newton*[345] used much less sweeping language than Judge Debevoise, although the panel affirmed the result below on the grounds that the defendants lacked scienter.[346] The panel specifically held "that, where defendants are under no affirmative legal duty to disclose their order execution practices and those practices are widely followed within the securities industry, as a matter of law there is no scienter when defendants fail to disclose those practices."[347]

On the face of it, the panel's decision was more in line with traditional notions of a court's role, as its result had been reached without reliance on a doctrine of judicial restraint. But the practical results of the panel's reasoning are almost identical. In determining whether a legal duty to disclose existed, the panel relied in part on the history of SEC and NASD rulemaking with respect to order execution practices, concluding "that the fact that the Securities and Exchange Commission perceived the need to address these order execution practices through the regulatory process indicates strongly, if not conclusively, that the 'duty' to cross orders and to look beyond the NBBO for pricing information was ambiguous, indeed speculative, during the class period."[348] In other words, the panel was not willing to address the NBBO issue because the SEC was studying the area, thus exhibiting the same extreme deference to the SEC found in Judge Debevoise's opinion below.

The plaintiffs moved for a rehearing en banc, which the Third Circuit granted, while at the same time vacating the panel's decision.[349] The en banc Third Circuit reversed the district court, holding that, based "[o]n the record before us, we believe a reasonable trier of fact could conclude that the defendants misrepresented . . . and that this misrepresentation was intentional or reckless."[350]

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[345] Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,480, at 97,223 (3d Cir. June 19, 1997).

[346] *Newton* [1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 97,227. The panel "assume[d], without deciding, that the trading practices here constituted an otherwise actionable misrepresentation." *Id.* at 97,224.

[347] *Id.* at 97,226.

[348] *Id.* at 97,227.

[349] Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 115 F.3d 1135 (3d Cir. 1997).

The unanimous en banc opinion was written by Judge Stapleton, who had dissented in the panel's earlier decision, and, thus, shares the approach and even some language with the dissent. The en banc opinion noted "the fact, deemed determinative by the district court, that execution of customer orders at the NBBO was a practice 'widely, if not almost universally followed' in the securities industry during the class period."[351] The en banc opinion further noted that the defendants might be able to raise a factual issue for the jury concerning their expectations and those of their clients concerning execution based on any evidence of such a practice.[352] Summary judgment, however, could not be granted based on such evidence because "[e]ven a universal industry practice may still be fraudulent."[353]

The en banc opinion gave primacy to the role of the courts in interpreting and construing the federal securities laws.[354] Although the en banc opinion in *Newton* seems to herald a different approach to the courts' role in federal securities regulation from that in the *Press* case or the payment for order flow cases, the practical results of the *Newton* litigation were no different. The next step in the *Newton* case was a decision on whether a class should be certified. The en banc Third Circuit reversed the district court's grant of summary judgment and remanded.[355] On remand, Judge Debevoise held that class certification would be denied,[356] and the denial was upheld on appeal.[357] Without class certification, most individual claims that could be brought were too small to justify a lawsuit.[358]

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[350] Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266, 274 (3d Cir. 1998).

[351] *Newton*, 135 F.3d at 274 (quoting *In re Merrill Lynch Sec. Litig.*, 911 F. Supp. at 772).

[352] *In re Merrill Lynch Sec. Litig.*, 911 F. Supp. at 273.

[353] *Id.* at 274.

[354] *Id.* The en banc opinion quoted from a 1974 district court case for the proposition that "'[i]n the final analysis, ultimate responsibility for construction and enforcement of the securities laws must rest with the court.'" *Id.* (quoting Langert v. Q-1 Corp., Fed. Sec. L. Rep. (CCH) ¶ 94,445, at 95,540 (S.D.N.Y. March 15, 1974)); *see also* Merrill Lynch, Pierce, Fenner & Smith v. Bobker, 808 F.2d 930, 936 (2d Cir. 1986) (suggesting that it is ultimately the duty of a court to interpret the meaning of a statute regardless of the interpretation that the SEC may have given to it (citing Int'l Bhd. of Teamsters v. Daniel, 439 U.S. 551, 566 n.20 (1979))). In addition, the en banc opinion held that "[t]he district court was not deprived of this enforcement authority just because no court or regulator had previously chosen to exercise such authority with respect to the practice challenged here." *Newton*, 135 F.3d at 274.

C. Class Certification

Judge Debevoise held that the class certification motion failed to meet the requirements of Federal Rules of Civil Procedure 23(a)(3), (a)(4) and 23(b)(3) because (1) the plaintiffs' claims were not typical of the proposed class' claims;[359] (2) the plaintiffs were not adequate representatives of the class[360] and (3) there were not "common questions of law or fact" because damages would have to be determined on a trade by trade basis.[361] The latter seems to have troubled Judge Debevoise the most as he discussed it first and at greatest length. Plaintiffs made an interlocutory appeal (under Federal Rule of Civil Procedure 23(f)) of Judge Debevoise's order denying class certification to the Third Circuit, which permitted the appeal.[362] The panel that heard the appeal contained only one judge who had participated in the en banc decision.[363] The Third Circuit noted that it would perform "a preliminary inquiry into the merits" of the plaintiffs' case in order "to determine whether the alleged claims can be properly resolved as a class action."[364]

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[355] *Newton*, 135 F.3d at 274-75.

[356] *In re* Merrill Lynch Sec. Litig., 191 F.R.D. 391, 394-98 (D.N.J. 1999).

[357] Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 181-93 (3d Cir. 2001).

[358] In the 1995 district court decision, Judge Debevoise had calculated possible damages in thirteen trades conducted by the defendants for the class representatives. *In re* Merrill Lynch Sec. Litig., 911 F. Supp. 754, 764 (D.N.J. 1995), *rev'd en banc*, Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266 (3d Cir. 1998). He found that there were damages in, at most, three of the trades, with the amounts being $19.20 (120 shares traded), $25.00 (1000 shares traded), and $437.50 (7000 shares traded). *In re Merrill Lynch Sec. Litig.*, 911 F. Supp. at 764-65; *see also Newton,* 259 F.3d at 165 ("[S]ome of the securities claims pressed by the putative class members may be too small to survive as individual claims."). It is certainly possible that a sufficiently large and active trader might have a significant amount of damages and, therefore, a sufficient motivation to bring an individual action. It is likely, however, that such a trader would be a sophisticated investor and would have a difficult time proving that it was not "generally aware of the . . . exclusive reliance on the NBBO" by broker-dealers in executing securities trades. *Newton,* 135 F.3d at 273. Such awareness, as the Third Circuit panel noted, "would . . . be quite probative" of how the trader expected its orders to be executed. *Id.* In other words, it would be difficult for the trader to meet the reliance element of a Rule 10b-5 action. *See, e.g.,* Kline v. First W. Gov't Sec., Inc., 24 F.3d 480, 493 (3rd Cir. 1994) (suggesting that a sophisticated investor's reliance on an alleged misstatement or omission may often be unreasonable).

[359] *In re Merrill Lynch Sec. Litig.,* 191 F.R.D. at 397-98.

[360] *Id.* at 398.

In taking this fairly radical action, the Third Circuit cited only to an article by Professor Hazard.[365] Normally a court does not engage in an examination of the merits of a claim in deciding whether to certify a class.[366] Professor Hazard advocated a number of reforms to deal with "'(b)(3)' class suits-suits in which the claims are entirely, or primarily, for money but do not involve a limited fund. Familiar examples include . . . claims based on misrepresentation in the securities markets . . . [and] suits alleging improper financial practices by financial institutions."[367] One of Professor Hazard's proposals was that there should be a trial of a limited number of "reasonably typical" claims, including discovery.[368] This procedure, in Professor Hazard's view, would allow the parties to the litigation to "establish [] a reasonable valuation of the claims involved."[369] Another advantage would be to ensure that a class action that can have a material impact on a defendant would only go forward if there were merits to the claims.[370]

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[361] *Id.* at 395-97.

[362] *Newton*, 259 F.3d at 162.

[363] Judge Scirica had participated in both decisions. *Compare Newton,* 135 F.3d at 268, *with Newton,* 259 F.3d at 161. Judges Fuentes and Garth were the other two judges in the interlocutory appeal. *Newton*, 259 F. 3d at 161.

[364] *Newton*, 259 F.3d at 168.

[365] *Id.* at 168 n.9.

[366] *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974). *See generally* Edward H. Cooper, *Class Action Advice in the Form of Questions,* 11 DUKE J. COMP. & INT'L L. 215, 234 (2001) (discussing the opposition of both plaintiffs and defendants to a rule that would allow for consideration of the merits at the certification stage because such consideration would approach "full-scale litigation of the merits" and class certification following such an inquiry "would have a devastating impact" on the litigation); Ian Gallacher, *Representative Litigation in Maryland: The Past, Present, and Future of the Class Action Rule in State Court,* 58 MD. L. REV. 1510, 1553-55 (1999) (examining the limitations on considering the merits of a case at the class certification stage and concluding that a court may consider the merits of "certification issues," but may consider the merits of factual issues only where those issues will inevitably arise as a result of considering the certification issues).

[367] Geoffrey C. Hazard, Jr., *Class Certification Based on Merits of the Claims,*

Attractive as Professor Hazard's proposals may be, there was no minitrial of typical claims in the *Newton* case. Although Judge Debevoise had examined thirteen trades by the plaintiffs with the defendants,[371] there had been no discovery that allowed plaintiffs to develop a full factual record as the case never proceeded past summary judgment.[372] In addition, Professor Hazard was not concerned with the mechanics of conducting a class action, which was the ground upon which class certification was denied in *Newton*. Rather, he was concerned with the merits of the claims.

In carrying out its preliminary inquiry, the Third Circuit focused on two elements of a Rule 10b-5 action: reliance and loss causation. As to reliance, the Third Circuit was willing to

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69 TENN. L. REV. 1, 1 (2001) (footnote omitted).

[368] *Id.* at 5.

[369] *Id.* at 3. Although Professor Hazard is never explicit about the problems in not having such a valuation, presumably this would facilitate the litigation process. As Professor Hazard describes the current situation:

> [I]n class suit litigation, the radically different characterizations by the parties often persist even after discovery has substantially progressed. In most other types of litigation, as discovery progresses, the lawyers for the contending parties usually begin to converge their estimates of the case value. The same is not true in many consumer class suits.

Id. at 2.

[370] *Id.* at 11.

[371] *In re* Merrill Lynch Sec. Litig. 911 F. Supp. 754, 764 (D.N. J. 1995), *rev'd en banc*, Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266 (3d Cir. 1998).

[372] *In re Merrill Lynch Sec. Litig.*, 911 F. Supp. at 756. At the court's order, the defendants did furnish some information concerning transactions executed on behalf of the plaintiffs, *id.*, but the plaintiffs maintained that this information was not all the information necessary to examining the best execution issue, Reply Declaration of Haim Mendelson at 3-4, *In re* Merrill Lynch Securities Litigation, 911 F. Supp. 754 (D.N.J. 1995) (No. 94-5343) (declaration by plaintiffs' expert witness).

hold that "presuming reliance [by the plaintiffs] would be appropriate because defendants allegedly failed to disclose their trade execution practice."[373] Loss causation was more troubling to the Third Circuit.

It was the issue of how the plaintiffs would "establish that a 'better' price was obtainable for each executed trade" that troubled the Third Circuit,[374] as it had troubled Judge Debevoise. "If a 'better' price was unavailable for a particular trade, then a class member could not have suffered injury and cannot maintain a Rule 10b-5 claim."[375] As the NBBO price may have been the best price for any particular trade, a trade-by-trade factual inquiry would be necessary "to determine actual injury."[376] No presumption of class-wide damage could be made because, unlike typical securities actions, *Newton* did "not involve a misrepresentation or omission that decreased the value of a security . . . [or] a practice [such as an excessive overpricing policy] that necessarily harmed investors across the class."[377]

In light of this preliminary inquiry, the Third Circuit then turned to Rule 23. First, the Third Circuit held that the district court had erred in holding that there were typicality and adequacy of representation problems under Rules 23(a)(3) and (4).[378] Then the Third Circuit turned to Rule 23(b)(3), holding that the putative class failed to meet the "predominance of common issues" required by the rule.[379] The Third Circuit agreed with the district court that determining injury for each trade would be a "Herculean task, involving hundreds of millions of transactions."[380] Finally, the Third Circuit, in dictum, noted that "[e]ven if . . . damages could be presumed or determined in separate proceedings after certification, this action fails to satisfy Fed. R. Civ. P. 23(b)(3)'s superiority requirement."[381] The Third Circuit's reasoning was circular, however, as it returned to the manageability concerns that it had discussed under the predominance test and had assumed away in raising manageability as an issue.[382] The Third Circuit also rejected the plaintiffs' argument that as "each individual claim is so small that only a class action will provide a remedy . . . denying certification will absolve defendants from wrongdoing."[383] This factor was not enough by itself to meet the requirements of Rule 23(b). In addition, the Third Circuit "recognize[d] that some class members, such as large institutional investors who fall within the class definition, arguably would have a significant financial stake to raise stand-alone claims."[384] The Author is skeptical of such a claim, as most large institutional investors would have a difficult time proving that they relied on an implied representation by a broker-dealer that it would execute trades at something other than the NBBO.[385]

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[373] Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 177 (3d Cir. 2001).

[374] *Newton*, 259 F.3d at 178.

[375] *Id.*

[376] *Id.* at 179. The plaintiffs did not help themselves on this point. They relied upon general statements by their own expert that he could "devise a formula which measures class-wide damages and from which a plan of allocation can be constructed." *Id.* at 188 n.33 (quoting Declaration of Dr. Haim Mendelson in Support of Plaintiffs' Motion of Class Certification at 5, *In re* Merrill Lynch Sec. Litig., 911 F. Supp. 754 (D.N.J. 1995) (No. 94-5343)). The plaintiffs made no attempt to describe this formula and how it would work. Dr. Mendelson's description consisted of fourteen typewritten lines of generalities, all of which the Third Circuit reprinted in footnote thirty-three. The Third Circuit would not have found for the plaintiffs "even if plaintiffs could present a viable formula for calculating damages (which they have not) . . . [because] defendants could still require individualized proof of economic loss." *Id.* at 188.

[377] *Newton*, 259 F.3d at 180.

[378] *Id.* at 182-86.

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[379] *Newton*, 259 F.3d at 187.

[380] *Id.* The Third Circuit saw the factual inquiry of "[w]hether a class member suffered economic loss from a given securities transaction" as "requir[ing] proof of the circumstances surrounding each trade, the available alternative prices, and the state of mind of each investor at the time the trade was requested." *Id.* One commentator has argued that the Third Circuit's "discussion of the predominance requirement puts the cart before the horse." Brian J. Wanamaker, Note, *Class Action and Rule 106-5: A Critique of* Newton v. Merrill Lynch, 80 WASH. U. L.Q. 997, 1019 (2002). Mr. Wanamaker argues that the Third Circuit should have focused on the process by which trades were executed rather than the outcomes of each trade. *Id.* at 1020. In other words, "it is proof of injury which is common and the calculation of damages which is individualized." *Id.* at 1020-21.

[381] *Newton*, 259 F.3d at 190.

[382] *Id.* at 192 ("The specter of adjudicating plaintiffs' claims at trial is, at the very least, daunting. Individual questions of economic loss present insurmountable manageability problems.").

[383] *Id.* at 191. For a critical exploration of this point, see Wanamaker, *supra* note 380, at 1022-24.

[384] *Newton*, 259 F.3d at 191.

The Third Circuit's denial of class certification was as effective a death knell to challenges of broker-dealers' use of the NBBO to meet best execution obligations as if the Third Circuit had adopted the deference approach taken by the *Press* court. The result reached by the Third Circuit is particularly ironic in light of its rejection of just such a deference approach, which had been urged by the Securities Industry Association in its amicus brief.[386] One way to understand the denial is to view it as a judicial heuristic that spares the court the unglamorous and time consuming job of actually deciding what best execution is in the context of a complicated factual situation.[387]

V. CONCLUSION

The courts have created substantial obstacles to plaintiffs who challenge widespread broker-dealer practices on the grounds that such practices violate the fiduciary duties owed to the plaintiffs. Courts are either unwilling to review such practices because the SEC is considering a regulatory regime to deal with the practices or because the practices do not uniformly impact all potential plaintiffs. Although neither approach completely immunizes broker-dealer practices from challenge, both approaches do dictate that the most effective forum for such a challenge is the SEC. In effect, the courts are either federalizing an area of traditional state authority (the nature of the fiduciary relationship between a broker-dealer and its clients),[388] deferring to an administrative agency in an area of traditional judicial competence[389] or doing both simultaneously.

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[385] See *supra* note 358 for a further discussion of this point.

[386] *Newton*, 259 F.3d at 166 n.7. The Third Circuit acknowledged that "market standards (such as 'best execution') . . . [that] affect the certainty of capital markets" should generally be set "through rule making by the appropriate agency. But courts should not hesitate to provide remedies for litigants injured by unlawful conduct that may not clearly violate regulatory standards." *Id.*

[387] See *supra* text accompanying notes 4-8 for a brief discussion of judicial heuristics in the context of securities class actions.

[388] *See, e.g.,* Congregation of the Passion, Holy Cross Province v. Kidder Peabody & Co., 800 F.2d 177, 181 (7th Cir. 1986) (declining to apply section 10(b) and Rule 10b-5 to an action by investors against their investment advisor because

Not only should we be concerned with matters of federalism and the separation of powers with this development, but we should also be concerned on a practical level. The SEC is not a surrogate for individual investors. In part, this is an issue of the SEC's basic orientation to the broker-dealer industry. And, in part, this is an issue of the SEC's resources. There are potential issues of capture of the regulatory agency by interest groups,[390] which may (but do not have to) include the

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the fiduciary relationship between them was a matter of "traditional state common law governance of such fiduciary relationships"); Greenwood v. Dittmer, 776 F.2d 785, 788 (8th Cir. 1985) (in an action involving a non-discretionary commodities account, refusing to apply CFTC definition of fiduciary duty and instead applying Arkansas law). *See generally* Weiss, *supra* note 332.

[389] Professor Poser has argued that "a de facto federal common law of fiduciary duty, applicable to broker-dealers, exists today." Poser, *supra* note 316, § 2.10[C], at 2-15. If Professor Poser is correct, then the courts are refusing to exercise in the cases examined in this Article one of their basic competences, the development of a body of law through case-by-case adjudication. *See generally* OLIVER WENDELL HOLMES, THE COMMON LAW 1-7, 22-35 (Little, Brown & Co. 1923) (1881) ("The life of the law has not been logic: it has been experience.").

[390] A regulatory agency can be captured by a public lobby, including pro-consumer groups, as well as by the regulated industry. RICHARD A. HARRIS & SIDNEY M. MILKIS, THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES 154-86 (2d ed. 1996). Whether the SEC has been captured has been a matter of some discussion. *Compare* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET xi (1982) [hereinafter SELIGMAN, TRANSFORMATION OF WALL STREET] (the SEC is not "a 'captive' of the industries it regulates. Quite simply, such a suggestion cannot be sustained by a reasonable reading of the Commission's history."), *with* SUSAN M. PHILLIPS & J. RICHARD ZECHER, THE SEC AND THE PUBLIC INTEREST 21-23 (Richard Schmalersee ed., 1981) (applying public choice theory to argue that the public interest has not been "an important consideration in the [SEC's] regulatory process"). One commentator has gone so far as to argue that the SEC is an obsolete agency due to fundamental changes in America's capital markets, which has led to its capture by interest groups. *See* Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty,* 15 CARDOZO L. REV. 909, 948-49 (1994).

From an individual investor's perspective, the problem with the SEC is that so few individual investors participate in SEC rule making. *See* U.S. GENERAL ACCOUNTING OFFICE, GAO/GGD-86-83, SECURITIES REGULATION: SECURITIES AND EXCHANGE COMMISSION OVERSIGHT OF SELF REGULATION 55 (1986) [hereinafter GAO, SEC 1986]. The SEC has reported that "small investors rarely comment on proposed [self-regulatory organization (SRO)] rule changes" but that this is not a problem in reviewing SRO rule changes because the SEC officials "believed that regulated industry, and conflicting congressionally mandated goals for the SEC. The SEC has a mandate to improve market efficiency as well as to protect investors. These two goals may, at times, conflict, and the SEC must make a value judgment favoring one over the other.[391] And, of course, the balance between efficiency and investor protection in the SEC's decision-making is not a fixed equation and may change over time.[392] Furthermore, the courts fail to take into account the impact of the anti-regulatory movement born in the Reagan administration on the SEC's ability to function. This is particularly surprising considering the extensive scholarly writing on this topic,[393] although not on the SEC in particular. Although the ultimate import of this anti-regulatory movement is far from clear,[394] it has affected, at a minimum, SEC funding and staffing.[395]

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they themselves adequately represented the interests of the small investor in the rule review process." *Id.* This is a statement for which the Author is unaware of any well-developed support.

[391] *See* Jonathan R. Macey & David D. Haddock, *Shirking at the SEC: The Failure of the National Market System*, 1985 U. ILL. L. REV. 315, 322-27 (1985). This Article takes no position on Professors Macey and Haddock's basic point that the SEC has used the "public interest" as a subterfuge to disguise its search to maximize its political support by favoring certain "special interests" in the securities industry. *See id.* at 361-62.

[392] Another possible dichotomy in the SEC's goals of potential importance to evaluating its regulatory regime is between its functions in promoting full disclosure by market participants and in regulating the market. The SEC has been a signal success in "provid[ing] investors with the information needed to trade intelligently in markets free of fraud and other abuse." Walter Werner, *The SEC As a Market Regulator*, 70 VA. L. REV. 755, 755 (1984). In contrast, the SEC has not been as successful in its "attempt to ensure the effective and responsible operation both of those [securities] markets and of the securities industry." *Id.*

[393] *See, e.g.*, HARRIS & MILKIS, *supra* note 390 (discussing the FTC and EPA); GEORGE C. EADS & MICHAEL FIX, RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA 207-34 (1984).

[394] While the EPA, for example, suffered significant "budgetary cutbacks, reductions in enforcement actions, and the near-elimination of new regulations, the institutions and policies of the public lobby regime held firm." HARRIS & MILKIS, *supra* note 390, at 275. The Reagan administration had achieved, in this interpretation, "temporary regulatory relief rather than lasting regulatory change." *Id. But see* EADS & FIX, *supra* note 393, at 207-34 (noting that the Reagan administration succeeded in shifting responsibility for certain environmental problems to states, which in many areas have not been as active as the EPA).

[395] *See* GAO, SEC 1986, *supra* note 390, at 58-60.

The decline in the early 1980s in the SEC's resources took place while the trading volume, transaction numbers, individual investor participation and number of broker-dealers all increased materially.[396] While the SEC's resources have increased since the mid-1980s,[397] they have failed to increase at a rate even remotely comparable to the tremendous growth of the securities markets.[398] The lack of an increase in SEC resources is particularly troubling because of the increased involvement of individual investors in the securities markets in the last two decades[399] combined with increased trading volumes.[400] As the GAO noted in 1986, commenting on a similar phenomenon ten years earlier:

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[396] *See id.* The SEC has suffered through other periods when its resources were severely restricted, particularly during the first two years of the Eisenhower presidency, when its staff "fell to 666 persons, the lowest level in the post-World War II period," *see* SELIGMAN, THE TRANSFORMATION OF WALL STREET, *supra* note 390, at 268, and more than fifty percent less than the number employed in 1941, *id.* at 267. In a pattern that resembles the mid to late 1990s, the securities markets in the late-1950s boomed, while, at the same time, "widespread speculative activity and securities fraud" at a level not seen "since the late 1920s" was occurring. *Id.* at 273. Not surprisingly, more resources were then devoted to the SEC, although "the SEC's staff increases never kept pace with the booming securities market." *Id.* at 277.

[397] In fiscal year 1982, the SEC had 1882 positions and a budget of approximately $83 million. *See* SEC ANN. REP. iii-iv (1982). By fiscal year 1994, the SEC had 2775 positions and a budget of approximately $256 million. *See* SEC ANN. REP. 160 (1994). In fiscal year 2002, the SEC had 3353 positions and a budget of approximately $515 million. *See* SEC ANN. REP. 180 (2002).

[398] In the period from 1982 to 2001, looking only at share trading on exchanges, the number of shares traded increased from 22,491,935,000 shares to 371,754,237,000 shares, *see* SEC ANN. REP. 175 (2002), and the dollar volume increased from $603,094,266,000 to $12,750,234,370,000, *see id.* at 176. *See generally* Stephen Labaton, *In Stormy Time, S.E.C. Is Facing Deeper Trouble*, N.Y. TIMES, Dec. 1, 2002, at 1 [hereinafter Labaton, *In Stormy Time*] (describing the SEC's current resource problems).

[399] *See* INVESTMENT COMPANY INSTITUTE & SECURITIES INDUSTRY ASSOCIATION, EQUITY OWNERSHIP IN AMERICA 2002, at 1 fig. 1 (2002) (the number of households owning equities has risen from 15.9 million (19.0%) in 1983 to 52.7 million (49.5%) in 2002; the number of individuals owning equities has risen from 42.4 million in 1983 to 84.3 million in 2002). The figures reported in this study for 2002 include holdings of both mutual funds and individual equities, as well as equities owned inside and outside of employee-sponsored retirement plans. *Id.* at 3–5.

[400] From 1994 to 1996, on the NYSE alone, reported share and dollar volume grew from 73,420,401,000 shares and $2,454,241.6 million volume to 104,636,180,000 shares and $4,063,054.6 million volume. NYSE, FACT BOOK FOR

> Very recently individual investors have increased their trading, encouraged by a continued upward movement of the market. Growth in the number of transactions is important because a transaction, as the interaction of an investor with market professionals, is one of the basic activities that must be watched for potential problems.[401]

The issue of the SEC's resources has been highlighted by Enron and the other corporate scandals of 2001 and 2002. The Sarbanes-Oxley Act called for a 77% increase in the SEC's budget to $776 million.[402] By October 2002, the Bush administration sought a significant cut back in this increase, proposing an increase of about 50%.[403] This position may have reflected a Bush administration belief that corporate reform was no longer a priority.[404] Once the Public Company Accounting Board scandal blew up in late October 2002 and Harvey Pitt resigned in early November,[405] the Bush administration reversed its position, first supporting an increase even larger than the one contained in the Sarbanes-Oxley Act[406] and then a more modest but still significant increase.[407] For the fiscal year beginning October 1, 2003, the Bush administration has announced that it will seek a $842 million budget, which would allow the SEC to add at least 710 new staff members, an in-

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THE YEAR 1996, at 11 (1997). The growth has continued in recent years. In 2001, the NYSE "set its tenth consecutive trading-volume record . . . with a total 307.5 billion shares" which was, expressed in dollar terms, $10.5 trillion. NYSE, FACT BOOK FOR THE YEAR 2001, at 3 (2002).

[401] GAO, SEC 1986, *supra* note 390, at 59.

[402] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 793 (codified as 15 U.S.C. § 78kk (2002)) ("[T]here are authorized to be appropriated to carry out the functions, powers, and duties of the Commission, $776,000,000 for fiscal year 2003 . . . ").

[403] Stephen Labaton, *Bush Tries to Shrink S.E.C. Raise Intended for Corporate Cleanup* , N.Y. TIMES, Oct. 19, 2002, at A1.

[404] *Id.*

[405] See *supra* text accompanying notes 20-31 for a description of these events.

[406] Stephen Labaton, *Former Chairman of Stock Exchange Is Bush's S.E.C. Pick,* N.Y. TIMES, Dec. 11, 2002, at A1.

[407] David Rogers, *Senate Republicans Set to Boost Current SEC Budget Nearly 20%,* WALL ST. J., Jan. 3, 2003, at A3 ("Discussions now are focusing on a total budget in the neighborhood of $650 million for the fiscal year ending Sept. 30.").

crease of approximately 23%.[408]

Self-funding has been periodically proposed as a solution for the SEC's resource problems.[409] The SEC takes in substantial filing fees, which are turned over to the U.S. Treasury. Congress makes a separate yearly appropriation for the SEC's operating budget.[410] In 2001, the SEC collected nearly $2.3 billion from filing fees, while its budget was $427,272,000.[411] In part, self-funding has been rejected by Congress because it would weaken Congressional influence over the SEC and its agenda.[412]

The SEC's comparative lack of resources has impacted its ability to both effectively audit and study broker-dealer practices. This Author also assumes that there is a reciprocal relationship between these two activities. In other words, an administrative agency with a detailed working knowledge of the industry that it regulates, which would in part result from the types of audits that the SEC undertakes, would be able to formulate the goals of its empirical studies more exactly. Insofar as the SEC's practical knowledge of the broker-dealer industry is hampered by its lack of rigorous auditing, so too will its empirical studies fail to ask the right questions. As a result of these financial constraints, in the mid-1980s the SEC was only able to audit five to eight percent of broker-dealers each year through its oversight examination program.[413] This is not surprising when one realizes that there were only 100 SEC examiners for approximately 8000 broker-dealers.[414] The ratio of examiners to broker-dealers has not changed.[415]

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[408] Stephen Labaton, *Bush Proposes Big Increase in S.E.C. Budget,* N.Y. TIMES, Feb. 4, 2003, at C1. For the coming fiscal year, Congress has approved a budget for the SEC of $716 million, a 40% increase. Anne Arundel, *For the Record,* WASH. POST, Feb. 20, 2003, at T5. The SEC plans to use this increase to expand its staff by 800 members. Stephen Labaton, *S.E.C. Chief Says Fixing the Agency Will Take Time,* N.Y. TIMES, Mar. 14, 2003, at C1.

[409] Jacob M. Schlesinger, *Did Washington Help Set Stage for Current Business Turmoil?*, WALL ST. J., Oct. 17, 2002, at A1 (describing efforts in 1994 and 1995 by former SEC Chairman Arthur Levitt and Democratic Representative John Dingell to secure more financing for the SEC by allowing the SEC to keep more of the fees that it collected, which efforts were frustrated by Republican Senator Phil Gramm); *see also* Brett D. Fromson, *The Agency Without Security; Senate Defeat of Self-Funding Was a Major Blow to SEC,* WASH. POST, Aug. 27, 1994, at F1 (discussing advantages of self-funding scheme for SEC and tracing politics surrounding its defeat in the Senate).

[410] SEC ANN. REP. 179–80 (2002).

[411] *Id.*

[412] Labaton, *In Stormy Time, supra* note 398; Schlesinger, *supra* note 409.

The quality of the SEC's empirical studies of the securities industry has also greatly declined in the past decade.[416] The lack of rigor in the SEC's most recent overall study of the securities markets, *Market 2000: An Examination of Current Equity Markets*, may be a reflection of deficiencies in the SEC's resources. At the very least, this lack of rigor cautions against too much deference to the SEC when the courts are dealing with industry-wide practices that the SEC has studied but not yet regulated.

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[413] *See* UNITED STATES GENERAL ACCOUNTING OFFICE, GAO/GGD-86-26, SECURITIES AND FUTURES: HOW THE MARKETS DEVELOPED AND HOW THEY ARE REGULATED 51 (1986).

[414] *See id.* The scarcity of SEC resources has led one defense lawyer to propose "neatness" as a preventive measure because SEC "inspectors often must rely on a first impression of a registrant, based on the appearance of its records, to determine whether an intensive inspection of that registrant is warranted." Richard D. Marshall, *SEC Inspections; The Preventable Prelude to Enforcement Action, in* THE SECURITIES ENFORCEMENT MANUAL: TACTICS AND STRATEGIES 13, 18 (Richard M. Phillips ed., 1997).

[415] In 1994, "[t]he SEC completed a total of 680 examinations, consisting of 478 oversight and 202 cause examinations." SEC ANN. REP. 34 (1994). As there were over 8600 registered broker-dealers, *see id.* at 28, in 1994 the SEC conducted oversight examinations of approximately 5.5% of these broker-dealers. In 2002, the numbers were similar as the SEC conducted "626 oversight, cause, and surveillance examinations." SEC ANN. REP. 72 (2002). The SEC has taken several steps to use its scarce resources more effectively. It has centralized its inspection staff into the Office of Compliance Inspections and Examinations, whose director reports to the SEC chairman. Establishment of Office and Delegation of Authority to Administer Functions, Exchange Act Release No. 34-36,031, 60 Fed. Reg. 39,643 (Aug. 3, 1995). In addition, the SEC has entered into Memoranda of Understanding with certain SROs and the comptroller of the currency to coordinate broker-dealer inspections and has entered into joint declarations with certain overseas securities regulators about inspecting foreign advisers. *See* Marshall, *supra* note 414, at 25-26. The Author is unaware of any study evaluating the effectiveness of these measures.

[416] *See* Joel Seligman, *Another Unspecial Study: The SEC's Market 2000 Report and Competitive Developments in the United States Capital Markets,* 50 BUS. LAW. 485, 485-88 (1995) (criticizing SEC COMM'N, MARKET 2000: AN EXAMINATION OF CURRENT EQUITY MARKET DEVELOPMENTS (Jan. 1994), the SEC's most recent overall study of the securities markets, for its lack of comprehensiveness, inadequate research and presentation of the research that was done and lack of independence of the study's staff).

As puzzling as the courts' refusal to exercise their traditional powers in adjudicating the legality of widespread broker-dealer practices has been on jurisprudential grounds, it is even more puzzling on practical grounds. Judicial deference to administrative agency expertise is grounded, in part, on the idea that the administrative agency has superior resources and industry specific experience to those available to the courts.[417] When this assumption comes into serious question, as it has over the past decade, the courts would do well to adjudicate those securities cases that are brought, rather than hoping that the SEC will deal with the legal issues.[418]

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[417] *See, e.g.,* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (asserting administrative determinations are consistently followed where interpretation involves policy considerations or something more than ordinary knowledge); Sea-Land Serv., Inc. v. Dep't of Transp., 137 F.3d 640, 644-45 (D.C. Cir. 1998) (noting statutory interpretation questions that involve policy considerations are of the sort where "expertise and political accountability of administrative agencies command judicial deference").

[418] The same type of deference issues have arisen between state regulators and the SEC over the conflicts in integrated financial service firms between investment banking and stock analysis. Traditionally, investigation and regulation of these conflicts would have fallen to the SEC, in part because any regulation by a particular state has potential nationwide ramifications. In light of the SEC's inability and/or unwillingness to deal with these issues, the Author is thankful that state regulators, led by New York State Attorney General Eliott Spitzer, moved forward with their investigations. *See generally* Joshua Chaffin, *Determination of a Crusader Brings the Banks to Heel*, FIN. TIMES, Dec. 21, 2002, at 17 ("Despite numerous meetings in Washington, [then SEC chairman] Mr. Pitt resisted Mr. Spitzer and his investigation. The SEC would not join forces with Mr. Spitzer until months later, when Mr. Pitt's own fate was in doubt."). The courts can learn something from these efforts about the importance of actors other than the SEC in federal securities regulation.

ADVICE OF COUNSEL AND INSURANCE BAD FAITH

Douglas R. Richmond[*]

I. INTRODUCTION

Bad faith liability is a serious threat to insurers. Juries routinely return staggering verdicts against insurance companies that are perceived to have breached their duty of good faith and fair dealing owed to their insureds.[1]

Distilled to its essence, bad faith liability turns on unreasonable conduct by the accused insurer. Seldom do insurers set out to be unreasonable in the resolution of claims by or against their insureds; to the contrary, insurers generally try to resolve claims and suits to their insureds' satisfaction. Nonetheless, many claims present unclear and close factual questions, and coverage is commonly an issue. Coverage determinations are often difficult. Insureds and claimants can be uncooperative, and insurance fraud is a constant threat.[2] In the liability insurance context, the insured's liability may be seriously doubted, or the claimant's damages may appear to be inflated. Insurers faced with such problems often turn to outside counsel for advice and strategic assistance.[3] Counsel may guide the investigation of major losses and accidents. Insurers routinely seek coverage opinions from lawyers in both liability and first-party contexts. Indeed, lawyers "infest the claim settlement process."[4]

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[*] Partner, Armstrong Teasdale, LLP, Kansas City, Missouri. This article uses the masculine pronoun "he" for simplicity's sake; it does not evidence gender bias. The views expressed here are the author's alone.

[1] Sally Agel & Felton Newell, *Guarding Privileged Documents Poses Challenge to "Utmost Good Faith" Doctrine,* NAT'L UNDERWRITER PROPERTY & CASUALTY/RISK & BENEFITS MANAGEMENT EDITION, Apr. 28, 2003, at 17 ("In recent years, the size of bad faith judgments against insurance companies has increased astronomically in many jurisdictions.").

[2] *See, e.g.,* David L. Nersessian, *Penalty by Proxy: Holding the Innocent Policyholder Liable for Fraud by Coinsureds, Claims Professionals, and Other Agents,* 38 TORT TRIAL & INS. PRAC. L.J. 907, 908 (2003) (stating that insurance fraud "seemingly has reached epidemic proportions in the United States" and offering various measures of the cost of insurance fraud); *Insurance Fraud Ring Busted,* KAN. CITY STAR, June 8, 2003, at A2 (reporting on insurance fraud ring in Chicago in which the ringleaders recruited homeless persons to pose as accident victims and then broke their arms or legs with an axe handle); *One-Fourth of U.S. Adults Say Inflating Insurance Claims is OK,* BEST'S REV., Apr. 2003, at 60 ("About one in four adults in the United States say that exaggerating the value of claims to insurance companies is acceptable, and more than one in 10 say they approve of submitting insurance claims for items that were not lost or damaged or treatments that were not provided . . . ."); Tom Hays, *Staged Accidents Had A*

An insurer sued for bad faith arising out of a claim in which the insurer consulted with counsel must decide whether to assert advice of counsel as a defense. The advice of counsel defense essentially provides that "when an insurer's actions are in conformity with advice given to it by counsel, the insurer's actions are taken in good faith, and thus the essential element that an aggrieved insured must demonstrate in establishing insurer bad faith is nullified."[5] The extent or efficacy of the defense depends on the jurisdiction. In some jurisdictions an insurer's reliance on the advice of counsel is an absolute defense, while other courts treat advice of counsel as but one factor to be considered when evaluating the reasonableness of an insurer's conduct.[6] An insurer's reliance on the advice of counsel also may be a defense to punitive damages because it defeats or at least mitigates allegations of intentional misconduct or wrongdoing.[7]

To invoke the defense, the insurer first must have provid-

Cast of Many, KAN. CITY STAR, Oct. 20, 2002, at A4 (describing New York insurance fraud ring that staged fake automobile accidents and stating that its leader "thrived in an underworld populated by shady personal-injury lawyers and medical clinic operators who . . . profit from false negligence and no-fault claims" and reporting similar fraud rings in New Jersey, California and Texas).

[3] *See* Michael Sean Quinn, *The Advice-of-Counsel Defense: A Response to Fischer*, 72 TEX. L. REV. 1487, 1493 (1994) ("Advice from counsel is one way to increase the probability that the factual, linguistic, and legal dimensions of a troubling claim receive considered, careful, and objective treatment.").

[4] STEPHEN S. ASHLEY, BAD FAITH ACTIONS: LIABILITY AND DAMAGES § 7:13, at 7-44 (2d ed. 1997).

[5] James M. Fischer, *Should Advice of Counsel Constitute a Defense for Insurer Bad Faith?*, 72 TEX. L. REV. 1447, 1461-62 (1994).

[6] Douglas R. Richmond, *An Overview of Insurance Bad Faith Law and Litigation*, 25 SETON HALL L. REV. 74, 119-20 (1994).

[7] *See id.* at 120.

ed the attorney with all information necessary to render a reliable opinion.[8] The insurer cannot withhold key facts or information that would influence an attorney's opinion, whether done intentionally or negligently, and thereafter claim that the attorney's advice justified its actions. Second, the insurer's good faith reliance on counsel's advice is "an obvious prerequisite" for the defense to succeed.[9] Third, the insurer's reliance on the attorney's advice must be reasonable.[10] Advice of counsel is no defense where the attorney's advice is factually unsupported, where the attorney plainly misconstrues a statute or case law, or where the attorney advances an obviously unreasonable policy interpretation.[11] Fourth, the insurer must, in fact, act on the advice.[12]

It typically is not necessary for an insurer to specifically plead advice of counsel as an affirmative defense to invoke it as a defense. As the court in *State Farm Mutual Automobile Insurance Co. v. Superior Court*[13] explained:

> In response to a plaintiff's allegations of bad faith and malice, [an insurer] is entitled to show it acted reasonably and with proper cause based on the advice of its counsel. Good faith reliance on counsel's advice simply negates allegations of bad faith and malice as it tends to show the insurer had proper cause for its actions. Because advice of counsel is directed to an essential element of plaintiff's cause of action, it does not constitute new matter and need not be specifically alleged.[14]

A plaintiff who wants to determine whether an insurer defending a bad faith action intends to raise advice of counsel therefore must ferret out the insurer's intention by way of written discovery or deposition.

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[8] 1 WILLIAM M. SHERNOFF ET AL., INSURANCE BAD FAITH LITIGATION § 30.04[2], at 30-36 (1999); ASHLEY, *supra* note 4, § 7:13, at 7-52.

[9] George F. Hillenbrand, Inc. v. Ins. Co. of N. Am., 128 Cal. Rptr. 2d 586, 608 (Ct. App. 2002).

[10] Barnes v. Okla. Farm Bureau Mut. Ins. Co., 11 P.3d 162, 174 (Okla. 2000); *see also* Szumigala v. Nationwide Mut. Ins. Co., 853 F.2d 274, 282 (5th Cir. 1988) (stating that "where, through verbal sleight of hand, the advising attorney concocts an imagined loophole in a policy whose plain language extends coverage, such advice is heeded at the carrier's risk").

[11] *See Barnes*, 11 P.3d at 174.

[12] SHERNOFF ET AL., *supra* note 8, § 30.04[2], at 30-36; *see, e.g.*, Davis v. Cotton States Mut. Ins. Co., 604 So. 2d 354, 359-60 (Ala. 1992).

[13] 279 Cal. Rptr. 116 (Ct. App. 1991).

[14] *State Farm*, 279 Cal. Rptr. at 118.

An insurer that defends itself by asserting advice of counsel does so at some peril. By asserting advice of counsel as a defense, an insurer waives its attorney-client privilege as to all related communications and potentially exposes its counsel's work product to discovery.[15] Worse still from an insurer's perspective, some courts hold that an insurer defending a bad faith claim waives its attorney-client privilege if it "makes factual representations which implicitly rely upon legal advice as justification" for its actions.[16] In other words, in some circumstances an insurer may be deemed to have waived its attorney-client privilege even if it expressly disavows advice of counsel as a defense. And, in a monumentally flawed decision, the Ohio Supreme Court held in *Boone v. Vanliner Insurance Co.*[17] that an insurer's communications with counsel before denying coverage are "unworthy of protection" under the attorney-client privilege.[18]

This Article examines the advice-of-counsel defense in insurance bad faith litigation. It specifically focuses on the defense's overlap with the law of attorney-client privilege and work-product immunity.

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[15] *See* State *ex rel.* United States Fid. & Guar. Co. v. Canady, 460 S.E.2d 677, 688 (W. Va. 1995) (discussing the attorney-client privilege); *see also* Minn. Specialty Crops, Inc. v. Minn. Wild Hockey Club, L.P., 210 F.R.D. 673, 675-79 (D. Minn. 2002) (stating in a trademark infringement case that "[a]s to the attorney-client privilege, the general rule is that the assertion of an advice-of-counsel defense waives that privilege 'as to the communications and documents relating to the advice,'" and holding that the defendants' assertion of advice of counsel defense abrogated the work product immunity that they otherwise would have been entitled to assert) (quoting SNK Corp. of Am. v. Atlus Dream Entm't Co., 188 F.R.D. 566, 570 (N.D. Cal. 1999)).

[16] Tackett v. State Farm Fire & Cas. Ins. Co., 653 A.2d 254, 260 (Del. 1995).

[17] 744 N.E.2d 154 (Ohio 2001).

[18] *Boone*, 744 N.E.2d at 158.

II. INSURANCE BAD FAITH

Insurance falls into two basic categories: first-party and third-party. Only liability insurance is third-party insurance. It may be so described because the interests protected by the policy are those of strangers to the contract who are harmed by the insured's negligence.[19] Liability insurance may also be described as third-party insurance because it protects the insured against claims by another person or entity, i.e., a third party.[20] First-party insurance, on the other hand, protects insureds against their own injuries or losses.[21] Common examples of first-party coverage include disability insurance, health insurance, property insurance, and uninsured and underinsured motorist coverage. Both third-party and first-party coverages may be combined in a single policy, as in automobile and homeowners insurance policies.

A duty of good faith and fair dealing is implied in every insurance policy.[22] The implied duty of good faith and fair dealing fundamentally requires that the insurer do nothing to injure the insured's right to receive benefits due under its policy.[23] In most jurisdictions an insurer that breaches its duty of good faith and fair dealing commits the tort of bad faith. "Bad faith" is actionable as a tort only in the insurance context.[24] Courts have fashioned a tort duty of good faith and fair dealing to protect insureds from insurers' exploitation of their superior bargaining power and exclusive control over claims processing,[25] and because the business of insurance affects the public interest.[26]

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[19] Ball v. Midwestern Ins. Co., 829 P.2d 897, 900 (Kan. 1992); *see also* Richmond, *supra* note 6, at 80.

[20] *See* City of Burlington v. W. Sur. Co., 599 N.W.2d 469, 472 (Iowa 1999); Lynch v. Am. Family Mut. Ins. Co., 626 N.W.2d 182, 188 (Minn. 2001) (contrasting automobile liability coverage with uninsured motorist coverage); Mau v. N.D. Ins. Reserve Fund, 637 N.W.2d 45, 54 n.13 (Wis. 2001) (quoting Blazekovic v. City of Milwaukee, 610 N.W.2d 467 (Wis. 2000)).

[21] *See* Olds-Olympic, Inc. v. Commercial Union Ins. Co., 918 P.2d 923, 930 (Wash. 1996) (contrasting third-party and first-party insurance).

[22] Douglas R. Richmond, *Trust Me: Insurers Are Not Fiduciaries To Their Insureds*, 88 KY. L.J. 1, 7 (1999-2000).

[23] *See id.*

[24] *Id.* at 23.

"Bad faith" cannot be uniformly described or defined. To be guilty of bad faith an insurer generally must do more than breach its contract with its insured.[27] Most courts require intentional wrongdoing by an insurer to impose bad faith liability. As the Arkansas Supreme Court explained in *Columbia National Insurance Co. v. Freeman*:[28]

> An insurance company commits the tort of bad faith when it affirmatively engages in dishonest, malicious, or oppressive conduct in order to avoid a just obligation to its insured. We have defined "bad faith" as dishonest, malicious, or oppressive conduct carried out with a state of mind characterized by hatred, ill will, or a spirit of revenge. Mere negligence or bad judgment is insufficient so long as the insurer is acting in good faith. The tort of bad faith does not arise from a mere denial of a claim; there must be affirmative misconduct.[29]

Some states disavow this sort of high standard, however, instead allowing insureds to recover extra-contractual damages for insurers' mere negligence.[30]

In the liability insurance context, many bad faith claims are attributable to an insurer's failure to settle a covered claim or suit against its insured within policy limits followed by a verdict or judgment against the insured in excess of its policy limits.[31] The insurer's failure or refusal to settle a covered claim or suit must be unreasonable in order to expose the insurer to liability beyond its policy limits.[32] Determining whether an insurer acted unreasonably and thus in bad faith in this common scenario requires a weighing of such factors as (1) the probability of the insured's liability; (2) the amount of the policy limits; (3) the extent of the claimant's damages; (4) the adequacy of the insurer's investigation; (5) the adequacy of the defense provided by the insurer; (6) whether the insurer followed the defense attorney's advice regarding settlement; (7) whether the insurer heeded its own adjusters' advice regarding settlement; (8) the insurer's willingness to engage in settlement negotiations; (9) whether the insured made any misrepresentations that may have misled the insurer in settlement negotiations; (10) the openness of the communication between the insurer and the insured; (11) whether the insurer kept the insured informed of settlement negotiations; and (12) any other conduct demonstrating that the insurer felt or showed greater concern for its financial interests than it did for its insured's financial risk.[33]

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[25] *Id.*

[26] 20th Century Ins. Co. v. Superior Court, 109 Cal. Rptr. 2d 611, 626 (Ct. App. 2001); Kirk v. Mt. Airy Ins. Co., 951 P.2d 1124, 1126 (Wash. 1998).

[27] *See* Employees Benefit Ass'n v. Grissett, 732 So. 2d 968, 976 (Ala. 1998) (quoting case and discussing elements of bad faith claim); Parker v. S. Farm Bureau Cas. Ins. Co., 935 S.W.2d 556, 562 (Ark. 1996) ("The tort of bad faith cannot arise merely from the denial of a claim, without some affirmative misconduct.").

[28] 64 S.W.3d 720 (Ark. 2002).

[29] *Freeman*, 64 S.W.3d at 723 (citations omitted); *see also* State Auto Prop. & Cas. Ins. Co. v. Swaim, 991 S.W.2d 555, 559 (Ark. 1999).

[30] Richmond, *supra* note 6, at 98; *see, e.g.,* Cotton States Mut. Ins. Co. v. Brightman, 580 S.E.2d 519, 521 (Ga. 2003) ("An insurance company may be liable for the excess judgment entered against its insured based on the insurer's bad faith or negligent refusal to settle a personal claim within the policy limits.").

[31] For an insurer to be held liable for bad faith in failing to settle a claim

In the first-party context, the base issue is the insurer's allegedly wrongful refusal to pay a claim or its unreasonable delay in doing so. An insured charging first-party bad faith generally must establish (1) that the insurer's conduct was unreasonable and (2) that the insurer knew or reasonably should have known that it was being unreasonable in its handling or payment of the claim at issue.[34] This two-part test

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against its insured there must be a verdict or judgment in excess of policy limits. *See, e.g.,* Cont'l Ins. Co. v. Superior Court, 43 Cal. Rptr. 2d 374, 383 n.11 (Ct. App. 1995); State Farm Fire & Cas. Co. v. Zebrowski, 706 So. 2d 275, 277 (Fla. 1997); Allstate Ins. Co. v. Campbell, 639 A.2d 652, 659 (Md. 1994); Gainsco Ins. Co. v. Amoco Prod. Co., 53 P.3d 1051, 1059 (Wyo. 2002).

[32] *See* Kransco v. Am. Empire Surplus Lines Ins. Co., 2 P.3d 1, 9 (Cal. 2000); Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 557 S.E.2d 670, 674 (S.C. 2001); Nelson v. McLaughlin, 565 N.W.2d 123, 132 (Wis. 1997).

[33] These factors are drawn from *Truck Insurance Exchange v. Bishara,* 916 P.2d 1275, 1279-80 (Idaho 1996), *O'Neill v. Gallant Insurance Co.,* 769 N.E.2d 100, 106-09 (Ill. App. Ct. 2002), *Smith v. Audubon Insurance Co.,* 679 So. 2d 372, 377 (La. 1996), *Smith v. General Accident Insurance Co.,* 697 N.E.2d 168, 170-71 (N.Y. 1998), and *Smith v. Safeco Insurance Co.,* 50 P.3d 277, 281 (Wash. Ct. App. 2002).

[34] *See, e.g.,* Turner v. State Farm Fire & Cas. Cos., 614 So. 2d 1029, 1032

applies no matter what type of first-party coverage is in dispute.[35] The issue then becomes the standard under which this test is to be judged. Unfortunately, there is no uniform approach. Some courts hold that the first of these elements is determined by an objective standard, while the second is subjective;[36] other courts hold that both elements are to be measured by an objective standard.[37]

Regardless of the context, the unreasonableness of the insurer's conduct is the essence of bad faith.[38] Incorrect analysis and mistakes in judgment by insurance company employees are unfortunate, but they are not necessarily symptomatic of bad faith. An insurer is not liable for bad faith "just because hindsight shows its employees were wrong" in the handling of a case or claim.[39] Insurers are not banks or ATMs; they have no obligation to simply pay on demand. Insurers have no obligation to pay claims or losses that their policies do not cover. In short, an insurance company cannot be liable for bad faith if it has a reasonable basis for denying a claim.[40] An insurer may fairly challenge or dispute a claim that is "fairly debatable"

(Ala. 1993); Brown v. United States Fid. & Guar. Co., 977 P.2d 807, 815 (Ariz. Ct. App. 1998); Dale v. Guar. Nat'l Ins. Co., 948 P.2d 545, 551 (Colo. 1997); United Fire & Cas. Co. v. Shelly Funeral Home, Inc., 642 N.W.2d 648, 657 (Iowa 2002); Empire Fire & Marine Ins. Co. v. Simpsonville Wrecker Serv., Inc., 880 S.W.2d 886, 888 (Ky. Ct. App. 1994); Petrecca v. Allstate Ins. Co., 797 A.2d 322, 325 (Pa. Super. Ct. 2002) (quoting Terletsky v. Prudential Prop. & Cas. Ins. Co., 649 A.2d 680, 688 (Pa. Super. Ct. 1994)); Lauzon v. State Farm Mut. Auto. Ins. Co., 674 A.2d 1246, 1247 (Vt. 1995); Weiss v. United Fire & Cas. Co., 541 N.W.2d 753, 757 (Wis. 1995); Gainsco Ins. Co. v. Amoco Prod. Co., 53 P.3d 1051, 1058 (Wyo. 2002).

[35] McIlravy v. N. River Ins. Co., 653 N.W.2d 323, 329 (Iowa 2002) (discussing first-party bad faith claim under workers' compensation insurance policy).

[36] *See, e.g., Shelly Funeral Home*, 642 N.W.2d at 657.

[37] *See, e.g., Gainsco*, 53 P.3d at 1058.

[38] *See* Hartman v. Estate of Miller, 656 N.W.2d 676, 681 (N.D. 2003) (describing an insurer's unreasonable conduct as "[t]he gravamen of the test for bad faith"); Barnes v. Okla. Farm Bureau Mut. Ins. Co., 11 P.3d 162, 174 (Okla. 2000) (stating that "it is the unreasonableness of the insurer's actions that is the essence of the tort [of bad faith]").

[39] State Farm Mut. Auto. Ins. Co. v. Lee, 13 P.3d 1169, 1175 (Ariz. 2000).

[40] *Shelly Funeral Home*, 642 N.W.2d at 652; Murphree v. Fed. Ins. Co., 707 So. 2d 523, 529 (Miss. 1997); Martin v. Allianz Life Ins. Co. of N. Am., 573 N.W.2d 823, 829 (N.D. 1998); Mixson, Inc. v. Am. Loyalty Ins. Co., 562 S.E.2d 659, 661 (S.C. Ct. App. 2002).

without breaching its duty of good faith and fair dealing.[41]

III. THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT IMMUNITY

Confidential communications between attorneys and their clients typically are protected from discovery by two legal doctrines: the attorney-client privilege and work product immunity.

A. The Attorney-Client Privilege

The attorney-client privilege is one of the oldest common law privileges protecting confidential communications,[42] and it has now been widely codified. The privilege is intended to "ensure full disclosure by clients who feel safe confiding in their attorney."[43] The prevailing privilege test was announced more than fifty years ago in *United States v. United Shoe Machinery Corp.*[44] The *United Shoe* test provides:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is the member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a)

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[41] *See, e.g.*, McGilvray v. Farmers New World Life Ins. Co., 28 P.3d 380, 386 (Idaho 2001); *Shelly Funeral Home*, 642 N.W.2d at 657 (quoting cases); Motorists Mut. Ins. Co. v. Glass, 996 S.W.2d 437, 453-54 (Ky. 1999); Radecki v. Mut. of Omaha Ins. Co., 583 N.W.2d 320, 326 (Neb. 1998); Villa Enters. Mgmt. Ltd. v. Fed. Ins. Co., 821 A.2d 1174, 1188-89 (N.J. Super. Ct. Law Div. 2002); Skaling v. Aetna Ins. Co., 799 A.2d 997, 1010-11 (R.I. 2002); Stene v. State Farm Mut. Auto. Ins. Co., 583 N.W.2d 399, 403 (S.D. 1998); Prince v. Bear River Mut. Ins. Co., 56 P.3d 524, 533-34 (Utah 2002); Lauzon v. State Farm Mut. Auto. Ins. Co., 674 A.2d 1246, 1247 (Vt. 1995); Ellwein v. Hartford Accident & Indem. Co., 15 P.3d 640, 645 (Wash. 2001); Trinity Evangelical Lutheran Church and School-Freistadt v. Tower Ins. Co., 661 N.W.2d 789, 795 (Wis. 2003); *Gainsco,* 53 P.3d at 1058.

[42] Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998); Wemark v. State, 602 N.W.2d 810, 815 (Iowa 1999); Doe v. Maret, 984 P.2d 980, 982 (Utah 1999).

[43] Lane v. Sharp Packaging Sys., Inc., 640 N.W.2d 788, 798 (Wis. 2002).

[44] 89 F. Supp. 357, 358-59 (D. Mass. 1950).

> by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal preceding, and not (d) for the purpose of committing a crime or tort: and (4) the privilege has been (a) claimed and (b) not waived by the client.[45]

Although the *United Shoe* test implies that the privilege attaches only from the client to the attorney, confidential communications from an attorney to a client are also privileged.[46]

The right to assert the privilege belongs to the client.[47] As a practical matter, however, it generally falls to lawyers to raise the privilege on their clients' behalf.

Courts narrowly construe the attorney-client privilege because it limits full disclosure of the truth.[48] There is much the privilege does not protect. For example, while the privilege protects the content of an attorney-client communication from disclosure, it does not protect from disclosure the facts communicated.[49] The privilege does not shield from discovery communications generated or received by an attorney acting in some other capacity; nor does it shield communications in which an attorney is giving business advice rather than legal advice.[50]

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[45] *In re* Sunrise Sec. Litig., 130 F.R.D. 560, 595 (E.D. Pa. 1989) (quoting *United Shoe* and *In re* Grand Jury Investigation, 599 F.2d 1224, 1233 (3d Cir. 1979)).

[46] Byrd v. State, 929 S.W.2d 151, 154 (Ark. 1996); Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co., 730 A.2d 51, 60 (Conn. 1999); Clausen v. Nat'l Grange Mut. Ins. Co., 730 A.2d 133, 137-38 (Del. Super. Ct. 1997); Squealer Feeds v. Pickering, 530 N.W.2d 678, 684 (Iowa 1995); Rent Control Bd. v. Praught, 619 N.E.2d 346, 350 (Mass. App. Ct. 1993); Palmer v. Farmers Ins. Exch., 861 P.2d 895, 906 (Mont. 1993).

[47] *Lane*, 640 N.W.2d at 798.

[48] Ullman v. State, 647 A.2d 324, 330-31 (Conn. 1994); E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc., 718 A.2d 1129, 1138 (Md. 1998); Whitehead v. Nev. Comm'n on Judicial Discipline, 873 P.2d 946, 948 (Nev. 1994); Callahan v. Nystedt, 641 A.2d 58, 61 (R.I. 1994); *Lane*, 640 N.W.2d at 798 (quoting cases).

[49] EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 48 (4th ed. 2001).

[50] *See, e.g.*, First Aviation Servs., Inc. v. Gulf Ins. Co., 205 F.R.D. 65, 68-69 (D. Conn. 2001) (ordering production of documents generated by law firm while functioning as claims investigator rather than as legal advisor); Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's London, 676 N.Y.S.2d 727, 730 (Sup. Ct. 1998), *aff'd*, 692 N.Y.S.2d 384 (App. Div. 1999) (discussing generally the attorney-client privilege and specifically noting that the privilege does not attach

Moreover, the privilege is easily waived. Waiver of the attorney-client privilege may be either express or implied. It is implied waiver claims that most often ensnare litigants.

Courts generally employ one of three approaches to determine whether a party has impliedly waived its attorney-client privilege. The first of these is the so-called "automatic waiver" rule, which holds that a party automatically waives the privilege by asserting a claim, counterclaim or affirmative defense "that makes an issue of otherwise privileged material."[51] Thus, an insurer that raises advice of counsel as an affirmative defense to a bad faith claim waives its attorney-client privilege with respect to all related communications.[52]

The second approach, derived from the case of *Hearn v. Rhay*,[53] holds that the privilege is waived when three factors are met: (1) the assertion of the privilege was the result of some affirmative act by the asserting party; (2) through this affirmative act the asserting party put the privileged information or communication at issue by making it relevant to the case; and (3) application of the privilege will deny the opposing party information vital to its case.[54] This test requires that in order to be revealed, the attorney-client communications must be more than "incidental" to the case; they must "inhere in the controversy itself, and to deny access to them would preclude the court from a fair and just determination of the issues."[55] Though forged outside the insurance context, the *Hearn* approach now reflects the majority rule.[56]

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where the attorney is acting as a "mere scrivener"); Evans v. United Servs. Auto. Ass'n, 541 S.E.2d 782, 791 (N.C. Ct. App. 2001) (stating that "an insurance company and its counsel may not avail themselves of the protection afforded by the attorney-client privilege if the attorney was not acting as a legal advisor when the communication was made").

[51] John M. Palmeri & Thomas B. Quinn, *Implied Waiver of the Attorney-Client Privilege*, *in* THE ATTORNEY-CLIENT PRIVILEGE 47, 49 (Def. Research Inst. 2002).

[52] *See* EPSTEIN, *supra* note 49, at 347.

[53] 68 F.R.D. 574 (E.D. Wash. 1975).

[54] *See Hearn*, 68 F.R.D. at 581.

[55] *Id.* at 582.

[56] Palmeri & Quinn, *supra* note 51, at 51. *Hearn* has been criticized, however, for its confusing and inconsistent application, and because it yields unstable analysis. *See, e.g.,* Pub. Serv. Co. of N.M. v. Lyons, 10 P.3d 166, 172-74 (N.M. Ct. App. 2000). The *Hearn* test has also been criticized for potentially chilling attor-

The third approach is described in *Rhone-Poulenc Rorer Inc. v. Home Indemnity Co.*,[57] and holds that the privilege is waived only where a party asserts a claim or defense "and attempts to prove that claim or defense by disclosing or describing an attorney client communication."[58] The *Rhone-Poulenc* approach differs little from the automatic waiver rule in the case of an insurer pleading advice of counsel as an affirmative defense to a bad faith claim. The difference may be dramatic, however, where an insurer has relied on the advice of counsel in formulating its coverage position but does not specifically put that advice at issue. Under the automatic waiver rule, an insurer might waive its privilege merely by raising the affirmative defense of failure to state a claim or by seeking a declaratory judgment that a loss is not covered, even if it never makes advice of counsel an element of its case. The *Rhone-Poulenc* approach is much narrower; absent an affirmative decision by the insurer to put its attorney's advice in issue there can be no waiver even if the insurer's decisions were influenced by that advice.[59] The fact that an insurer's corporate state of mind may be at issue is not sufficient to create an implied waiver of its attorney-client privilege.[60]

Occasionally, a plaintiff in a bad faith case argues that an insurer's communications with its attorney are discoverable under the crime-fraud exception to the attorney-client privilege.[61] The crime-fraud exception recognizes that because the attorney-client privilege serves the important public policy of encouraging frank discussions between clients and their counsel, it ought not be abused.[62] Thus, if a client consults an attorney to facilitate the commission of a wrong, the privilege

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ney-client communications, for increasing litigation costs through discovery disputes and as tending to favor wealthier litigants. *See, e.g.*, Mortgage Guarantee & Title Co. v. Cunha, 745 A.2d 156, 159 (R.I. 2000) (citing cases).

[57] 32 F.3d 851 (3d Cir. 1994).

[58] *Rhone-Poulenc*, 32 F.3d at 863.

[59] *See id.* at 863-64.

[60] *See id.* at 864.

[61] *See, e.g.*, Cent. Constr. Co. v. Home Indem. Co., 794 P.2d 595 (Alaska 1990); Barry v. USAA, 989 P.2d 1172 (Wash. Ct. App. 1999).

[62] 1 PAUL R. RICE ET AL., ATTORNEY CLIENT PRIVILEGE IN THE UNITED STATES § 8:2, at 21 (2d ed. 1999).

will not shield those communications from discovery.[63]

The crime-fraud exception generally should not find any application in the insurance bad faith context. The crime-fraud exception does not apply to communications which reflect advice sought or given concerning past wrongdoing.[64] In a bad faith action, of course, an insurer is being sued for past misconduct.[65]

B. The Work Product Doctrine

"The work product doctrine is an independent source of immunity from discovery, separate and distinct from the attorney-client privilege."[66] Unlike the attorney-client privilege, which is the client's to claim, work product immunity is held by or belongs to the lawyer.[67] The work product doctrine protects lawyers' effective trial preparation by immunizing certain information and materials from discovery. The work product doctrine traces its roots to *Hickman v. Taylor*,[68] in which the Supreme Court sought to foreclose unwarranted inquiries into attorneys' files and mental impressions in the guise of liberal discovery.[69]

There are two categories or types of attorney work product: "fact" or "ordinary" work product, better described as "tangible" work product, and "opinion" or "core" work product, sometimes termed "intangible" work product. Tangible work product includes such documents as memoranda, notes, witness statements and the like. To qualify as tangible work product, the material sought to be protected must be a document or tangible thing prepared in anticipation of litigation by or for a party, or by or for the party's representative.[70] "Opinion" work product refers to an attorney's conclusions, legal theories, mental impressions or opinions.[71]

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[63] *Id.* § 8:2, at 21-22.

[64] Royal Surplus Lines Ins. Co. v. Sofamor Danek Group, Inc., 190 F.R.D. 463, 488 (W.D. Tenn. 1999).

[65] The allegation in a bad faith case may be that the insurer unreasonably denied coverage; unreasonably refused to pay a claim in whole or part, or delayed in doing so; or unreasonably refused to settle a claim or suit within policy limits. Regardless, the insurer's misconduct had to take place before the insured's bad faith claim became ripe, meaning that the crime-fraud exception – which requires future or continuing misconduct – cannot apply.

[66] Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976).

[67] Clausen v. Nat'l Grange Mut. Ins. Co., 730 A.2d 133, 138 (Del. Super. Ct. 1997).

[68] 329 U.S. 495 (1947).

[69] *Hickman*, 329 U.S. at 510.

The work product doctrine formulated in *Hickman* is now substantially codified in Federal Rule of Civil Procedure 26(b)(3) and its state counterparts. Rule 26(b)(3) provides in pertinent part:

> Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of [the party's] case and that [the party] is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.[72]

Work product protection is not absolute. As Rule 26(b)(3) makes clear, a party may be entitled to discover its adversary's tangible work product where it demonstrates substantial need of the materials to prepare its case and it is unable without undue hardship to obtain the substantial equivalent of the materials by other means. The discovering party must specifically explain its need for the materials sought.[73] "Undue hardship" generally devolves into an issue of what it will cost the discovering party to obtain the same or comparable information by other means.[74] Whether work product immunity will be abrogated in any particular case typically depends on available alternative sources of the information sought, the parties' relative resources and the need to protect the target party's expectation of confidentiality.[75]

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[70] FED. R. CIV. P. 26(b)(3).

[71] EPSTEIN, *supra* note 49, at 568.

[72] FED. R. CIV. P. 26(b)(3).

[73] EPSTEIN, *supra* note 49, at 550.

Opinion work product, on the other hand, receives almost absolute protection against discovery.[76] To discover an adversary's opinion work product, a party must demonstrate something far greater than the substantial need and undue hardship necessary to obtain tangible work product. Discovery of opinion work product may be permitted where the attorneys' conclusions, mental impressions or opinions are at issue in the case and there is a compelling need for their discovery.[77]

A key discovery issue may be whether information claimed to be work product was generated or prepared "in anticipation of litigation." This is often a difficult determination in insurance cases because the potential for litigation exists any time an insurer declines to pay a claim.[78] Of course, information that is not generated in anticipation of litigation does not qualify for protection as work product.[79]

An insurer may be said to reasonably anticipate litigation if a claimant threatens suit.[80] In the right circumstances, the fact that an insured or claimant employs an attorney may cause an insurer to anticipate litigation.[81] An insurer may reasonably anticipate litigation once it issues a reservation of rights letter.[82] Generally speaking, "[i]t is not necessary that litigation be threatened or imminent, as long as the prospect of litigation is identifiable because of claims that have already arisen."[83] Courts deciding if litigation was anticipated typically consider (1) whether the circumstances at the time of the insurer's claim investigation would cause a reasonable person to anticipate litigation; and (2) whether the insurer asserting work product protection had a good faith belief that litigation would ensue.[84] The first prong of this test is objective and the second is subjective.[85]

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[74] *Id.* at 566.

[75] *Id.* at 567.

[76] *Id.* at 549.

[77] *See* Holmgren v. State Farm Mut. Auto. Ins. Co., 976 F.2d 573, 577 (9th Cir. 1992).

[78] Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 640 (E.D.N.Y. 1997); *see also* Urban Outfitters, Inc. v. DPIC Cos., 203 F.R.D. 376, 379 (N.D. Ill. 2001) (discussing the anticipation of litigation requirement and stating that "[b]ecause of the nature of their work, documents generated by insurance companies investigating claims or potential claims present special challenges").

[79] In contrast, the attorney-client privilege is not limited to communications made in anticipation of litigation. *In re* Tex. Farmers Ins. Exch., 990 S.W.2d 337, 340 (Tex. App. 1999).

[80] *Magee*, 172 F.R.D. at 640-41; Parker v. S. Farm Bureau Cas. Ins. Co., 935 S.W.2d 556, 561 (Ark. 1996).

[81] *See, e.g.*, Ring v. Commercial Union Ins. Co., 159 F.R.D. 653, 656-57

IV. ADVICE OF COUNSEL

As a general rule, a plaintiff in a bad faith action cannot pierce an insurer's attorney-client privilege simply by making an allegation of bad faith.[86] The same is true with respect to work product immunity.[87] The mere fact that a plaintiff alleges that an insurer acted in bad faith does not permit him to rummage through the insurer's files mindless of attorney-client

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(M.D.N.C. 1995) (discussing first-party case in which insurer reasonably suspected that the insured set fire to his hardware store); Haynes v. Anderson, 597 So. 2d 615, 619 (Miss. 1992) (discussing third-party claimant's employment of an attorney who wrote to insurer).

[82] *See* Royal Surplus Lines Ins. Co. v. Sofamor Danek Group, Inc., 190 F.R.D. 463, 492 (W.D. Tenn. 1999).

[83] Nat'l Tank Co. v. 30th Judicial Dist. Ct., 851 S.W.2d 193, 205 (Tex. 1993).

[84] MICHAEL F. AYLWARD, PROTECTING THE PRIVILEGE: EVIDENTIARY CHALLENGES IN INSURANCE COVERAGE DISPUTES § IV.B.1 (Def. Research Inst. 2001) (citing *National Tank*, 851 S.W.2d at 203).

[85] *Nat'l Tank*, 851 S.W.2d at 203-04.

[86] Brennan v. W. Nat'l Mut. Ins. Co., 199 F.R.D. 660, 663 (D.S.D. 2001); Dion v. Nationwide Mut. Ins. Co., 185 F.R.D. 288, 294 (D. Mont. 1998); Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co., 173 F.R.D. 7, 11 (D. Mass. 1997); Dixie Mill Supply Co. v. Continental Cas. Co., 168 F.R.D. 554, 556-58 (E.D. La. 1996); State Farm Mut. Auto. Ins. Co. v. Lee, 13 P.3d 1169, 1179 (Ariz. 2000); Tackett v. State Farm Fire & Cas. Ins. Co., 653 A.2d 254, 259 (Del. 1995); Hartford Fin. Servs. Group, Inc. v. Lake County Park & Rec. Bd., 717 N.E.2d 1232, 1235-38 (Ind. Ct. App. 1999).

[87] *Brennan,* 199 F.R.D. at 663; *Ferrara*, 173 F.R.D. at 12; *Dixie Mill*, 168 F.R.D. at 558-59; Ring v. Commercial Union Ins. Co., 159 F.R.D. 653, 657-59 (M.D.N.C. 1995); Parker v. S. Farm Bureau Cas. Ins. Co., 935 S.W.2d 556, 561 (Ark. 1996).

and work product protections.[88] On the other hand, a waiver will be found where an insurer expressly relies upon the advice of counsel as a defense,[89] where an insurer provides privileged or immune documents to an expert witness[90] or where an insurer designates its defense attorney in the underlying tort action as a fact or expert witness in a subsequent bad faith action.[91] Problems arise in the many other gray areas that characterize insurance bad faith litigation.

A. *Cases and Controversies*

Courts have taken varying approaches when determining whether an insurer has waived the attorney-client privilege by relying on its attorney's advice in the defense of a bad faith action. In *Palmer v. Farmers Insurance Exchange*,[92] for example, the Montana Supreme Court held that an insurer waives the privilege only when it "'directly relies'" on advice of counsel as a defense.[93] Because the insurer had listened to its attorney's advice in denying its insured's uninsured motorist claim but did not directly rely on that advice as a defense to the insured's subsequent bad faith claim, the *Palmer* court held that there was no waiver.[94]

The issue in *Metropolitan Life Insurance Co. v. Aetna Casualty & Surety Co.*[95] was whether a number of excess insurers could obtain from Metropolitan numerous written communications between Metropolitan and its attorneys regarding settlements of more than 200,000 asbestos personal injury actions. Metropolitan contended that the documents were protected from discovery by the attorney-client privilege. The excess insurers argued, among other things, that the documents were discoverable under the "at issue" exception to the attorney-client privilege.[96] The trial court ordered Metropolitan to produce the documents and Metropolitan then took an interlocutory appeal to the Connecticut Supreme Court.

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[88] *See Ring*, 159 F.R.D. at 658.

[89] *Lee*, 13 P.3d at 1179; Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co., 730 A.2d 51, 53 (Conn. 1999); Palmer v. Farmers Ins. Exch., 861 P.2d 895, 907 (Mont. 1993).

[90] *See, e.g.,* State *ex rel.* Tracy v. Dandurand, 30 S.W.3d 831 (Mo. 2000).

[91] *See, e.g.,* Cincinnati Ins. Co. v. Zurich Ins. Co., 198 F.R.D. 81, 85-87 (W.D.N.C. 2000) (involving work product and attorney's designation as fact witness); Dion v. Nationwide Mut. Ins. Co., 185 F.R.D. 288, 292-96 (D. Mont. 1998) (involving attorney-client privilege, work product immunity and attorney's designation as expert witness).

[92] 861 P.2d 895 (Mont. 1993).

[93] *Palmer*, 861 P.2d at 907 (quoting Spectra-Physics v. Superior Court, 244 Cal. Rptr. 258, 261 (Cal. Ct. App. 1988)).

[94] *Id.* (citing *Spectra-Physics*, 244 Cal. Rptr. at 261).

[95] 730 A.2d 51 (Conn. 1999).

The *Metropolitan Life* court began its analysis by noting the important interests the attorney-client privilege serves and accordingly reasoning that exceptions to the privilege should be created "only when the reason for disclosure outweighs the potential chilling of essential communications."[97] Thus, the "at issue" or implied waiver exception to the privilege should be recognized "only when the contents of the legal advice is integral to the outcome of the legal claims of the action."[98] That is the case when a party specifically pleads its reliance on its attorney's advice as an element of a claim or defense, when it voluntarily testifies about the content of the communication or specifically places its relationship with its attorney at issue in some other way.[99] In such circumstances, the party has waived the privilege because the issue cannot be determined without examining the attorney's advice.[100]

The mere fact that attorney-client communications may be relevant does not put them at issue. As the court explained:

> If admitting that one relied on legal advice in making a legal decision put the communications relating to the advice at issue, such advice would be at issue whenever the legal decision was litigated. If that were true, the at issue doctrine would severely erode the attorney-client privilege and undermine the public policy considerations upon which it is based.[101]

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[96] *Metropolitan Life*, 730 A.2d at 56.

[97] *Id.* at 60.

[98] *Id.* (citing Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408, 412-15 (D. Del. 1992).

[99] *Id.*

[100] *Id.*

[101] *Id.* at 61.

Metropolitan had not pleaded reliance on any of the advice contained in the privilege documents. While the excess insurers were defending Metropolitan's claims for coverage by asserting that its settlements with the asbestos claimants were not reasonable despite its policy obligation to make reasonable settlements, that did not place the privileged documents at issue. Compliance with contract terms is generally an element in all insurance coverage actions, but reliance on advice of counsel in adhering to contract terms does not automatically place at issue the actual legal advice.[102] Thus, even though some Metropolitan senior executives testified in their depositions that their attorneys' advice was a significant motivating factor in their decision to settle the underlying asbestos tort actions, the privileged documents were not at issue because Metropolitan was not relying on the privileged communications to prove the reasonableness of the settlements.[103]

The *Metropolitan Life* court observed that it would be "quite different" had Metropolitan sought to prove that the asbestos settlements were reasonable based on the advice of counsel, for then counsel's advice would be at issue.[104] That was not the case, however. The excess insurers could assess the reasonableness of the settlements by examining the facts of the particular cases and by consulting with experts, as did Metropolitan.[105]

The *Metropolitan Life* court also noted that the trial court had apparently misconstrued the "at issue" exception by focusing on the defendants' need for the documents. The defendants' need for the documents was irrelevant. A party cannot abrogate an adversary's attorney-client privilege merely by claiming a need for the protected information.[106] There is no "unavailability exception" to the attorney-client privilege.[107]

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[102] *Id.* (citing Rockwell Int'l Corp. v. Superior Court, 32 Cal. Rptr. 2d 153, 161 (Ct. App. 1994)).

[103] *Id.* (citing N. River Ins. Co. v. Philadelphia Reinsurance Corp., 797 F. Supp. 363, 370 (D.N.J. 1992); *Rockwell*, 32 Cal. Rptr. 2d at 161; and Home Ins. Co. v. Advance Mach. Co., 443 So. 2d 165, 168 (Fla. Dist. Ct. App. 1983)).

[104] *Id.* at 62.

[105] *Id.*

[106] *Id.*

The waiver approach taken by the Delaware Supreme Court in *Tackett v. State Farm Fire & Casualty Insurance Co.*[108] stands in stark contrast to the conservative approach taken by the *Metropolitan Life* court. In *Tackett*, plaintiffs Billie and Truman Tackett sued their insurer, State Farm, for bad faith in delaying payment of their uninsured motorist claim.

The Tacketts alleged in their complaint that State Farm had refused to pay their claim without reasonable justification. State Farm denied the allegation in its answer. In an employee's affidavit incorporated in a subsequent interrogatory answer, State Farm claimed that documents in its claim file showed "a reasonable and orderly pattern of claims handling" which ultimately resulted in the payment of the Tacketts' claim.[109] The trial court held that, as a result of that interrogatory answer, State Farm had waived its attorney-client privilege and any claim of work product immunity. The case ultimately made its way to the Delaware Supreme Court.

The *Tackett* court noted at the outset that a plaintiff cannot force an insurer to waive the attorney-client privilege simply by filing a bad faith claim.[110] "Where, however, an insurer makes factual assertions in defense of a claim which incorporate, expressly or implicitly, the advice and judgment of its counsel, it cannot deny an opposing party 'an opportunity to uncover the foundation for those assertions in order to contradict them.'"[111] The court concluded that State Farm's interrogatory answer was sufficient to waive its attorney-client privilege, stating:

> Here, once State Farm alleged a routine handling of the Tacketts' claim and suggested that any delay was attributable to inaction on the part of the insured, the Tacketts could

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[107] *See id.* (citing Admiral Ins. Co. v. United States Dist. Court for the Dist. of Ariz., 881 F.2d 1486, 1494 & n.7 (9th Cir. 1989)).

[108] 653 A.2d 254 (Del. 1995).

[109] *Tackett*, 653 A.2d at 258.

[110] *Id.* at 259.

[111] *Id.* (quoting Friction Div. Prods. v. E.I. DuPont de Nemours, 117 F.R.D. 535, 538 (D. Del. 1987)).

> challenge those allegations only with a full showing of the facts contained in the claim file. To rule otherwise would permit State Farm to gain the inference that, not only was the claim handled routinely, but the routine analysis of the claim supported the delay in payment. Fairness requires the assertions of fact be tested by disclosure. Without access to the complete file, the Tacketts would be unable to challenge State Farm's assertions and would be forced to accept as true its claim of routine handling.[112]

The court next turned to State Farm's claim of work product immunity. A party's waiver of its attorney-client privilege does not automatically waive the protection afforded by the work product doctrine.[113]

The issue in *Tackett* was the plaintiffs' discovery of the opinion work product of State Farm's outside counsel, F. Alton Tybout. State Farm had rejected Tybout's advice when investigating the Tacketts' claim, ordering an independent medical examination of Ms. Tackett that Tybout did not believe worthwhile.[114] Because State Farm typically consulted with counsel regarding the value of insureds' claims, State Farm's rejection of Tybout's advice was critical evidence; its rejection of his advice tended to show a lack of reasonable justification to deny the Tacketts' claim. By rejecting Tybout's advice, State Farm created one of the few situations in which an attorney's opinion work product can become a pivotal issue in a bad faith case.[115]

> The processing of a claim by an insurer is almost entirely an internal operation and its file reflects a unique, contemporaneous record of the handling of the claim. The need for [opinion work product] "is not only substantial, but overwhelming." The Tacketts' claim for bad faith and State Farm's affirmative reliance on the "routine handling" of the case implicated the *entire* claim file (without excluding advice of counsel), thus

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[112] *Id.* at 260 (footnote omitted).

[113] *Id.* at 259 (citing Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 156 (D. Del. 1977)).

[114] *See id.* at 257, 262-63.

[115] *See id.* at 263.

> creating a compelling need to discover the full context in which State Farm handled their claim. A contrary finding would require a plaintiff, and the Court, to accept as true the insurer's assertions that it handled the claim in a proper manner.[116]

The court thus concluded that the Tacketts had shown the compelling need necessary to overcome Tybout's opinion work product protection.[117]

In *Vaught v. Dairyland Insurance Co.*,[118] the plaintiffs sued Dairyland, their uninsured motorist carrier, for breach of contract and bad faith. A key issue was whether Dairyland should have intervened in the Vaughts' personal injury action in which the phantom uninsured motorist was held to be partially at fault for plaintiff Carolyn Vaught's injuries. In its defense, Dairyland submitted an affidavit of its attorney, High, in which he recounted his conversations with the Vaughts' attorney regarding the Vaughts' desire that Dairyland not intervene in the tort action.[119] The Vaughts claimed that by submitting High's affidavit, Dairyland waived its attorney-client privilege. This was because High's affidavit supposedly evidenced Dairyland's belief that it would be bad faith to intervene.[120] The Idaho Supreme Court disagreed.

The *Vaught* court noted that High's affidavit did not mention bad faith, but only referred to communications with the plaintiffs' attorney. The communications between High and the plaintiffs' attorney clearly were not privileged. Because Dairyland did not put any privileged communications into evidence, it did not waive its attorney-client privilege.[121]

State Farm Mutual Automobile Insurance Co. v. Lee[122] was a class action in which some 1000 State Farm insureds with multiple State Farm policies contested State Farm's refusal to permit stacking of uninsured and underinsured motorist coverages. In discovery, State Farm produced documents from claims files in other cases and acknowledged that it sought and received advice from counsel as to whether it should pay or reject the plaintiffs' claims. State Farm denied that it intended to demonstrate its good faith by asserting an advice of counsel defense, and claimed that the attorney-client privilege protected from discovery its correspondence with counsel regarding its denial of stacking claims.[123]

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[116] *Id.* (citation omitted).

[117] *Id.*

[118] 956 P.2d 674 (Idaho 1998).

[119] *Vaught*, 956 P.2d at 680.

[120] *Id.*

[121] *Id.*

[122] 13 P.3d 1169 (Ariz. 2000).

The plaintiffs moved to compel discovery of the documents, arguing that State Farm implicitly waived the privilege by injecting the "subjective good faith beliefs and mental state of its claims people as an issue in the case."[124] The trial court sided with the plaintiffs, reasoning:

> In this case, Defendants have claimed that its [sic] managers held a good faith belief in their interpretation that stacking was not permitted under its insurance policies. *While not expressly setting forth the advice of counsel defense,* the facts in this case demonstrate that the Defendants' position on stacking was made after having its counsel review the applicable statutes and developing cases and advise the corporate decision makers. Thus, *the advice of counsel was a part of the basis for Defendants' position* that was taken. *The advice of counsel defense is impliedly one of the bas[e]s for the defense Defendants maintain in this action.* Defendants have, therefore, impliedly waived the attorney-client privilege.[125]

State Farm appealed and the Arizona Court of Appeals found that there had been no waiver.[126] The case then made its way to the Arizona Supreme Court.

The first question for the Arizona Supreme Court was how to characterize State Farm's defense. The court decided that State Farm characterized its position best:

> State Farm asserts that its conduct was objectively reasonable *and* subjectively reasonable and in good faith because of

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[123] *Lee*, 13 P.3d at 1172.
[124] *Id.*
[125] *Id.* at 1172-73.
[126] *Id.* at 1173-74.

> what its policies, the statute and the case law actually said (not what State Farm's lawyers said they said), *and because of what its personnel actually knew and did* (not what State Farm's lawyers told them to do).[127]

State Farm had its employees evaluate the law applicable to stacking, including cases, policy provisions and statutes. As part of that evaluation, State Farm employees were advised by counsel. State Farm admitted that, but asserted that its ultimate decisions were those of its employees; it did not decide whether to pay or deny a claim because of its lawyers' advice. The *Lee* court agreed with the trial court that, based on these admitted facts, State Farm made advice of counsel a part of its defense.[128]

The *Lee* court then turned to the issue of waiver. The court noted that an insurer's mere denial of the allegations in a complaint or petition does not effect a waiver, nor does an insurer waive its attorney-client privilege by asserting that it treated its insured in good faith.[129] On the other hand, an insurer's express reliance on advice of counsel as a defense is an implied waiver of the attorney-client privilege under any test.[130] But what of the vast middle ground?

The court reasoned that "a litigant's affirmative disavowal of express reliance on [a] privileged communication is not enough to prevent a finding of waiver."[131] A litigant cannot defend based on the contention that it acted reasonably because it educated itself about the law when its investigation and knowledge of the law includes the advice of counsel, and then invoke the attorney-client privilege to prevent its adversary from discovering what it actually learned and knew.[132] At some point, fairness prevents the privilege from being asserted.[133] The court selected this point by looking to Comment (b) to Section 80 of the *Restatement (Third) of the Law Govern-*

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[127] *Id.* at 1174.

[128] *Id.*

[129] *Id.* at 1175.

[130] *Id.*

[131] *Id.* at 1177.

[132] *Id.*

[133] *See id.* at 1178-79.

ing Lawyers and, embracing the last approach, stated there that the proper focus is whether the litigant asserting the privilege "has interjected the issue into the litigation and whether the claim of privilege, if upheld, would deny the inquiring party access to proof needed fairly to resist the client's own evidence on that very issue."[134] Thus:

> The party that would assert the privilege has not waived [it] unless it has asserted some claim or defense, such as the reasonableness of its evaluation of the law, which necessarily includes the information received from counsel. In that situation, the party claiming the privilege has interjected the issue of advice of counsel into the litigation to the extent that recognition of the privilege would deny the opposing party access to proof without which it would be impossible for the factfinder to fairly determine the very issue raised by that party. *We believe such a point is reached when*, as in the present case, *the party asserting the privilege claims its conduct was proper and permitted by law and based in whole or part on its evaluation of the state of the law.* In that situation, the party's knowledge about the law is vital, and the advice of counsel is highly relevant to the legal significance of the client's conduct. Add to the a fact that the truth cannot be found absent exploration of that issue, and the conditions [for implied waiver] are met.[135]

State Farm's claims managers could not testify that they investigated the state of the law and believed and concluded that their actions were legally permissible, but deny the plaintiffs the opportunity to explore the basis for the assertion. The court thus found that State Farm had impliedly waived its attorney-client privilege.[136]

State Farm contended that it was the plaintiffs and not it that had injected the subjective belief of its claims staff into the case. They did this by alleging that State Farm had deliberately misinterpreted the law to suit its own ends. While acknowledging that it would be difficult for State Farm to meet plaintiffs' allegations without affirmatively asserting that it studied relevant law, the *Lee* court reasoned that State Farm could defend simply by denying that it was acting unlawfully and asserting a defense of objective reasonableness.[137] That approach would force the plaintiffs to try to prove that State Farm acted unreasonably.[138] Even so, there was no doubt that State Farm faced serious problems caused by the advice of its counsel. The company was in some ways, the court noted, "between Scylla and Charybdis."[139]

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[134] *Id.* at 1179 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80 cmt. b (2000)).

[135] *Id.* (emphasis added) (footnote omitted).

[136] *Id.* at 1182.

The most liberal view of implied waiver was expressed by the Ohio Supreme Court in its 2001 decision in *Boone v. Vanliner Insurance Co.*[140] In that case, Richard Boone sued his insurer, Vanliner, for underinsured motorist (UIM) benefits under two policies. Boone's declaratory judgment complaint included a bad faith claim. In discovery, Boone sought access to Vanliner's claims file. In its answer to Boone's complaint, Vanliner denied that Boone was entitled to benefits under either policy. Vanliner later changed its position and admitted that its policies afforded coverage. Vanliner resisted Boone's efforts to discover into its claims file, contending that a number of documents in the file were protected by the attorney-client privilege and the work product doctrine.[141]

The trial court ordered Vanliner to produce its claims file for an *in camera* inspection. Of the 1741 documents in the file, the trial court determined that 175 were protected from discovery and ordered Vanliner to turn over the rest. Vanliner appealed, and a lower appellate court found that an additional 29 documents were protected, and remanded the case to the trial court.[142] The case then made its way to the Ohio Supreme Court where the issue was "whether, in an action alleging bad faith denial of insurance coverage, the insured is entitled to obtain, through discovery, claims file documents containing attorney-client communications and work product that may cast light on whether the denial was made in bad faith."[143]

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[137] *Id.* (citing United States v. Bilzerian, 926 F.2d 1285, 1292-93 (2d Cir. 1991)).

[138] *Id.*

[139] *Id.* at 1183.

[140] 744 N.E.2d 154 (Ohio 2001).

[141] *Boone*, 744 N.E.2d at 155.

[142] *Id.* at 156.

In deciding this issue, the *Vanliner* court was required to refer back to its decision in *Moskovitz v. Mount Sinai Medical Center*.[144] The issue in *Moskovitz* had been the plaintiffs' entitlement to prejudgment interest, and an Ohio statutory requirement that a party seeking prejudgment interest prove that its opponent did not make a good faith effort to settle the case. In that case, the court held that documents tending to show that a party did not attempt to settle in good faith were "wholly unworthy of the protections afforded by any claimed privilege."[145] Boone argued that Vanliner's "claims file materials showing [its] lack of good faith in determining coverage [were] equally unworthy of protection."[146]

Vanliner contended that if insureds alleging bad faith are able to discover privileged documents in insurers' claims files, then insurers will be discouraged from seeking legal opinions concerning coverage. The court rejected this argument because it assumes that insurers will violate their duties to thoroughly investigate claims by avoiding legal counsel when appropriate to avoid their insureds later obtaining privileged communications in discovery.[147]

Valiner further argued that releasing the documents at issue in connection with the bad faith claim would impair its defense of the UIM claim. The court also found this argument unpersuasive. Were this a legitimate concern, the court reasoned, Vanliner would have moved to stay prosecution of the bad faith claim or would have moved to sever it from the UIM claim.[148] Vanliner took no such action.[149]

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[143] *Id.*

[144] 635 N.E.2d 331 (Ohio 1994).

[145] *Moskovitz*, 635 N.E.2d at 349.

[146] *Vanliner*, 744 N.E.2d at 157.

[147] *Id.*

[148] *Id.* at 158.

[149] Courts sometimes hold that bad faith claims against insurers should be stayed until other claims in the same action, such as those for breach of contract, are resolved. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Cook, 744 So. 2d 567,

The *Vanliner* court held that "claims file materials that show an insurer's lack of good faith in denying coverage are unworthy of protection."[150] But the court did not stop there, going on to hold:

> [I]n an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage. At that stage of the claims handling, the claims file materials will not contain work product, *i.e.*, things prepared in anticipation of litigation, because at that point it has not yet been determined whether coverage exists.[151]

If, however, a trial court finds that the insured's discovery of privileged or immune information will impair the insured's defense of an underlying claim, it may stay the bad faith claim and related discovery until the underlying claim is resolved.[152]

B. Analysis

In attempting to settle on an appropriate waiver approach when an insurer has sought the advice of counsel, it seems logical to start with an analysis of *Vanliner*, inasmuch as the decision is so horribly wrong. What is wrong with *Vanliner*? To start, the decision abrogates the widely-accepted and long-held view that an insured cannot pierce an insurer's attorney-client privilege and work product immunity simply by alleging bad faith.[153] The dissent in *Valiner* specifically noted this problem, pointing out that the holding does not even require a prima facie showing of bad faith before an insured is entitled to discover an insurer's confidential communications.[154] As a conse-

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568 (Fla. Dist. Ct. App. 1999). *But see* Cales v. Le Mars Mut. Ins. Co., 69 P.3d 1206, 1208-09 (Okla. Ct. App. 2002) (rejecting bifurcation of breach of contract and bad faith claims because the theories are connected).

[150] *Vanliner*, 744 N.E.2d at 158.

[151] *Id.*

[152] *Id.*

[153] *See supra* notes 86-87 and accompanying text.

[154] *Vanliner*, 744 N.E.2d at 160 (Cook, J., dissenting).

quence, open and honest communications between insurers and their counsel are chilled, and the honest evaluation of claims is discouraged.[155]

The *Vanliner* court dealt with the argument that its sweeping abrogation of insurers' attorney-client privilege would chill open communications between insurers and their counsel this way:

> Vanliner further contends that if insureds alleging bad faith are able to access certain attorney-client communications within the claims file, then insurers will be discouraged from seeking legal advice as to whether a certain claim is covered under a policy of insurance. This argument is not well taken because it assumes that insurers will violate their duty to conduct a thorough investigation by failing, when necessary, to seek legal counsel regarding whether an insured's claim is covered under the policy of insurance, in order to avoid the insured later having access to such communications, through discovery.[156]

As the dissent noted, however, this position assumes without support that an insurer always has some sinister intent when it consults with an attorney.[157] It also wrongly assumes that an insurer cannot conduct a thorough, good faith investigation without consulting counsel. Moreover, the simple fact is that insurers often need to seek legal advice to make coverage determinations, and they often are wise to have counsel check the judgment of even seasoned claim professionals to make sure that all aspects of a claim have received appropriate attention. This is a classic example of a client seeking legal advice from an attorney, and such communications ought to be protected to the same extent that any other client would enjoy.[158]

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[155] *See* Guar. Nat'l Ins. Co. v. George, 953 S.W.2d 946, 948 (Ky. 1997) (quoting lower court opinion); State *ex rel.* United States Fid. & Guar. Co. v. Mont. Second Judicial Dist. Court, 783 P.2d 911, 915-16 (Mont. 1989).

[156] *Vanliner*, 744 N.E.2d at 157.

[157] *Id.* at 161 (Cook, J., dissenting).

[158] *Id.* (Cook, J., dissenting); *see also* Hartford Fin. Servs. Group, Inc. v. Lake County Park & Recreation Bd., 717 N.E.2d 1232, 1235-37 (Ind. Ct. App. 1999) (quoting Aetna Cas. & Sur. Co. v. Superior Court, 200 Cal. Rptr. 471, 474 (Cal. Ct. App. 1984)).

The *Vanliner* approach is dangerous and offends settled privilege law on a broader scale because it shifts control of the attorney-client privilege from the privilege holder to its adversary. Because reasoned advocacy serves a public end, and because such advocacy depends on parties and their counsel being fully informed, discouraging attorney-client communications in any type of litigation based solely on an adversary's theories or allegations does a disservice to the justice system as a whole. Furthermore, insurers have a duty to their other policyholders to contest illegitimate claims.[159] The recognition of a duty to dispute questionable claims rests on the assumption that an insurer's payment of illegitimate claims raises the cost of insurance for all of the company's policyholders.[160] The *Vanliner* approach hurts the insured public by discouraging insurers' consultation with counsel in the claim resolution process.[161]

What of the common situation where an insurer seeks counsel's advice only after the insured threatens suit or involves its own counsel prior to a denial of coverage? Once an insured threatens suit or employs counsel, the insurer can reasonably anticipate litigation concerning the claim or loss at issue, and it thus seems prudent for the insurer to get counsel of its own.[162] *Vanliner* abrogates the insurer's attorney-client privilege even in this scenario, significantly impairing the insurer's ability to defend itself against meritless bad faith and contractual liability claims or against claims that, while perhaps meritorious, are exaggerated or inflated. Perhaps worse still, the *Vanliner* court stated that communications between an insurer and counsel in this scenario would not enjoy work product immunity because it would not have been determined that coverage does not exist.[163] This is an incredibly misguided view, because it wrongly assumes that an insured cannot threaten litigation before a claim is denied, or that an insured cannot sue on a theory that does not depend on a finding of coverage. By virtue of this rationale, *Vanliner* – an intellectually vacant decision by any measure–is clearly devoid of persuasive value in any jurisdiction that recognizes bad faith liability in the absence of coverage.[164]

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[159] Time Ins. Co. v. Burger, 712 So. 2d 389, 393 (Fla. 1998).

[160] *See id.* (stating that an insurer's "[p]ayment of illegitimate claims raises the cost of insurance for all policyholders"); *see also* Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 60 (Tex. 1997) (Hecht, J., concurring) (stating that "an insurer must pay only valid claims and must deny invalid claims to keep premiums to customers at a minimum").

[161] *See* Quinn, *supra* note 3, at 1493 (arguing that advice of counsel increases the likelihood that troubling claims will receive "considered, careful, and objective treatment").

[162] *See supra* notes 80-81 and accompanying text.

Second, *Vanliner* guts the rule that attorney-client privileged communications are not discoverable merely because they are relevant to a dispute.[165] The Ohio Supreme Court ignored this settled principle for no apparent reason other than the fact that the litigant resisting discovery was an insurance company. Why are insurers not entitled to the same protections afforded other corporate litigants?

Third, the *Vanliner* approach ignores the essential truth that, in the overwhelming majority of cases, an insured seeking to prove an insurer's bad faith can develop the necessary facts through the discovery of non-privileged information.[166] To the extent the reasonableness of an insurer's actions can only be judged or attacked through some specialized analysis or explanation, an insured is free to employ expert witnesses. The insured's attorneys ought to be able to demonstrate and explain why the insurer's legal analysis is incorrect. There simply is no need to do away with the attorney-client privilege in insurance bad faith litigation.[167] Insureds' need for the information necessary to prove their cases can exist side-by-side with insurers' need to preserve their confidences.

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[163] *Vanliner*, 744 N.E.2d at 158.

[164] *See generally* Douglas R. Richmond, *Truly "Extracontractual" Liability: Insurer Bad Faith in the Absence of Coverage*, 29 TORT & INS. L.J. 740 (1994) (discussing bad faith in the absence of coverage).

[165] *See, e.g.*, Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co., 730 A.2d 51, 61 (Conn. 1999); Parker & Wobber v. Miles & Stockbridge, 756 A.2d 526, 546 (Md. 2000); State *ex rel.* United States Fid. & Guar. Co. v. Canady, 460 S.E.2d 677, 687 (W. Va. 1995).

[166] *See* Rockwell Int'l Corp. v. Superior Court, 32 Cal. Rptr. 2d 153, 161 (Ct. App. 1994); Hartford Fin. Servs. Group, Inc. v. Lake County Park & Recreation Bd., 717 N.E.2d 1232, 1237 (Ind. Ct. App. 1999).

[167] *See Parker & Wobber*, 756 A.2d at 546 (suggesting that, in order to find an implied waiver of the attorney-client privilege, "the privileged information sought must be available from no other source").

Although not as poorly reasoned as *Vanliner*, the Supreme Court of Delaware's decision in *Tackett v. State Farm Fire & Casualty Insurance Co.*[168] also misses the mark. In *Tackett*, the court was careful to state that it was not creating "a rule of *per se* waiver of the attorney-client privilege in bad faith cases," but stated in the next sentence of its opinion that where an insurer "makes factual representations which implicitly rely upon legal advice as justification for non-payment of claims," it cannot "shield itself from disclosure of the complete advice of counsel relevant to the handling of the claim."[169] And what was State Farm's factual representation that implicitly relied on the advice of counsel and thus waived the company's attorney-client privilege? It was an affidavit incorporated in an interrogatory answer in which a State Farm employee stated that facts in the subject claim file showed "a reasonable and orderly pattern of claims handling," and further stated that the plaintiffs' claim was handled "routinely."[170]

An insurer's assertion that it acted in good faith does not waive the attorney-client privilege,[171] nor does its denial that it acted in bad faith.[172] State Farm's interrogatory answer in *Tackett* is nothing more than a factual explanation of why it did not act in bad faith. That interrogatory required State Farm to "[s]et forth all facts in support of any claim by State Farm that it had any 'reasonable justification' in support of [its] decision not to pay Plaintiffs' claim in full."[173] Although State Farm could have simply listed the facts evidencing its reasonable claim handling, the fatal answer makes no mention of advice of counsel, or even the consideration or recognition of legal issues or principles that affected the adjustment of the plaintiffs' claim.

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[168] 653 A.2d 254 (Del. 1995).

[169] *Tackett*, 653 A.2d at 260.

[170] *Id.* at 258.

[171] Brennan v. W. Nat'l Mut. Ins. Co., 199 F.R.D. 660, 663 (D.S.D. 2001); State Farm Mut. Auto. Ins. Co. v. Lee, 13 P.3d 1169, 1175 (Ariz. 2000).

[172] *Lee*, 13 P.3d at 1175.

[173] *Tackett*, 653 A.2d at 258.

State Farm's interrogatory answer could have constituted a factual representation implicitly relying on legal advice justifying its denial of the plaintiffs' claim only if the court assumed without support in the record that insurers routinely rely on advice of counsel when scrutinizing claims for possible denial, or that such advice is a prerequisite for reasonable and orderly claims handling. But even then there ought to be no waiver for at least two reasons. First, this assumption will operate to abrogate the attorney-client privilege in all bad faith cases in direct contravention of the *Tackett* court's own statement that there is no per se waiver rule in bad faith cases.[174] Compliance with policy terms is an issue in all bad faith cases as is the manner in which the subject claim was handled. Second, the *Tackett* court's approach will chill attorney-client communications between insurers and their counsel, causing all of the problems discussed previously.[175]

If the Arizona Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Lee*[176] arguably did a better job of analyzing the issue of implied waiver than did the *Vanliner* and *Tackett* courts, it too erred. This it did, among other ways, by stating that "a litigant's affirmative disavowal of express reliance on [a] privileged communication is not enough to prevent a finding of waiver."[177] That cannot be. A key principle behind the idea of implied waiver is that a litigant should not be able to assert advice of counsel as a defense but invoke the attorney-client privilege to prevent its adversary from discovering the substance of the communication at issue in an attempt to overcome the defense. Where a party disavows advice of counsel as a defense, however, the potential for such unfairness is removed and there is no longer any need to permit the discovery of privileged communications.

In finding an implied waiver, the *Lee* court settled on the test supplied by Section 80 of the *Restatement (Third) of the*

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[174] *See id.* at 260.

[175] *See supra* notes 155-61 and accompanying text.

[176] 13 P.3d 1169 (Ariz. 2000).

[177] *Lee*, 13 P.3d at 1177.

Law Governing Lawyers.[178] Under the *Restatement* approach, the attorney-client privilege is waived only if "the client asserts as to a material issue in a proceeding" that it "acted upon the advice of a lawyer or that the advice was otherwise relevant relevant to the legal significance of the client's conduct."[179] As the dissent in *Lee* pointed out, however, State Farm never asserted its attorneys' advice as any form of defense; it was the plaintiffs who injected the advice of State Farm's counsel into the litigation.[180] The *Lee* court thus shifted control of the attorney-client privilege from its holder to the holder's adversary. This is an obvious problem in the insurance bad faith context with implications for other areas of the law where advice of counsel routinely is an issue, as in intellectual property litigation.

The many problems with *Vanliner*, *Tackett* and *Lee* raise the valid question of what should be the appropriate standard for finding an implied waiver of the attorney-client privilege in insurance bad faith litigation? That standard is found in *Rhone-Poulenc Rorer Inc. v. Home Indemnity Co.*,[181] which the Third Circuit expressed this way: "The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication."[182] In other words, a client waives its attorney-client privilege when it attempts to limit its liability by describing advice received from its attorney and by asserting that it relied on that advice.[183]

The *Rhone-Poulenc* approach is preferable for several reasons. First, it is consistent with the principle that the attorney-client principle should act as a shield and not a sword.[184] Second, by leaving to the client the decision whether to waive the privilege by putting its attorney's advice at issue, the *Rhone-Poulenc* approach provides certainty, consistency and predictability with respect to any possible finding of waiver and the circumstances in which a waiver may be found.[185] For this reason, the *Rhone-Poulenc* approach is also consistent with the principle that it is the client that holds and controls the attorney-client privilege – not an adversary. Third, by creating certainty, consistency and predictability as to the circumstances of waiver, the *Rhone-Poulenc* approach encourages clients to communicate with their lawyers without fear that their communications will be disclosed without their consent.[186] In this way the approach is consistent with the basic principle underlying the attorney-client privilege, which is to encourage full and frank communications between attorneys and their clients, and thus promote the broader public interest in fidelity to the law and the administration of justice.[187] It also benefits the insured public by increasing the likelihood that difficult claims will receive careful and objective treatment, ultimately reducing the cost of insurance for all policyholders. Fourth, by restricting the possibility of an implied waiver to well-defined circumstances, the *Rhone-Poulenc* approach discourages discovery disputes and thus reduces litigation costs. Fifth, this approach promotes basic principles of justice by discouraging bad faith plaintiffs from seeking an unfair advantage through the discovery of confidential information.[188]

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[178] *See id.* at 1178, 1181.

[179] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80(1)(a) (2000).

[180] *Lee*, 13 P.3d at 1184-86 (Martone, J., dissenting).

[181] 32 F.3d 851 (3d Cir. 1994).

[182] *Rhone-Poulenc*, 32 F.3d at 863.

[183] *See id.* (using a patent infringement suit as a hypothetical).

[184] Pub. Serv. Co. of N.M. v. Lyons, 10 P.3d 166, 174 (N.M. Ct. App. 2000).

In contrast, more liberal implied waiver rules, such as those expressed in *Hearn v. Rhay*[189] and the *Restatement*,[190] weaken the attorney-client privilege and lead to inconsistent results.[191] As the Third Circuit explained in its criticism of *Hearn* and similar cases:

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[185] *Rhone-Poulenc*, 32 F.3d at 863.

[186] *Id.* at 863-64.

[187] *Lyons*, 10 P.3d at 174 (explaining in part its rationale for adopting the *Rhone-Poulenc* approach) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

[188] Liberal implied waiver rules have been criticized because they "undermine the values served by the privilege rules." Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408, 413 (D. Del. 1992).

[189] 68 F.R.D. 574, 581 (E.D. Wash. 1975).

[190] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80 (2000).

[191] *See Lyons*, 10 P.3d at 173-74 (criticizing *Hearn*).

> Some decisions have extended the finding of a waiver of the privilege to cases in which the client's state of mind may be in issue in the litigation. These courts have allowed the opposing party discovery of confidential attorney client communications in order to test the client's contentions. *See, e.g., Byers v. Burleson*, 100 F.R.D. 436 (D.D.C.1983); *Hearn v. Rhay*, 68 F.R.D. 574 (E.D.Wash.1975). These decisions are of dubious validity. While the opinions dress up their analysis with a checklist of factors, they appear to rest on a conclusion that the information sought is relevant and should in fairness be disclosed. Relevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue.
>
> As the attorney client privilege is intended to assure a client that he or she can consult with counsel in confidence, finding that confidentiality may be waived depending on the relevance of the communication completely undermines the interest to be served. Clients will face the greatest risk of disclosure for what may be the most important matters. Furthermore, because the definition of what may be relevant and discoverable from those consultations may depend on the facts and circumstances of as yet unfiled litigation, the client will have no sense of whether the communication may be relevant to some future issue, and will have no sense of certainty or assurance that the communication will remain confidential.
>
> A party does not lose the privilege to protect attorney client communications from disclosure in discovery when his or her state of mind is put in issue in the action. While the attorney's advice may be relevant to the matters in issue, the privilege applies as the interests it is intended to protect are still served by confidentiality.[192]

Hearn, and cases like it, have fashioned an implied waiver test that chills attorney-client communications.[193] The same is true of the *Restatement*.

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[192] Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 864 (3d Cir. 1994).

[193] *See* Mortgage Guarantee & Title Co. v. Cunha, 745 A.2d 156, 159 (R.I. 2000) (noting criticisms of *Hearn* and citing cases).

If not *Rhone-Poulenc*, then what? Is there any other fair and workable approach? If there is a second best alternative, it is the approach taken by the Connecticut Supreme Court in *Metropolitan Life Insurance Co. v. Aetna Casualty & Surety Co.*[194] The *Metropolitan Life* court held that the implied waiver exception to the attorney-client privilege "is invoked only when the contents of the legal advice is integral to the outcome of the legal claims of the action."[195] The court noted that "[s]uch is the case when a party specifically pleads reliance on an attorney's advice as an element of a claim or defense, voluntarily testifies regarding portions of the attorney-client communication, or specifically places at issue, in some other manner, the attorney-client relationship."[196]

The *Metropolitan Life* approach is better than the approaches taken by the *Tackett* and *Lee* courts because it is much narrower. At the same time, the "integral to the outcome" standard is somewhat vague, and it is therefore susceptible to abuse and misinterpretation. Furthermore, what did the court mean when it suggested that a waiver might be found where an insurer specifically placed at issue the attorney-client relationship "in some other manner"?

In short, the *Metropolitan Life* standard, while adopted by some courts,[197] is not as advantageous as the *Rhone-Poulenc* approach. *Metropolitan Life* is not a bad decision–indeed, it is generally well-reasoned–but the waiver test it articulates still creates some potential for uncertainty and the inconsistent application of the attorney-client privilege.

Another key issue, of course, is the appropriate standard for determining whether, in a bad faith case, there has been a waiver of the insurer's attorney's work product immunity. Actually, it may be more accurate to say that the issue is deciding whether information constitutes work product in the first place, given that insurers investigate and deny claims and losses in the ordinary course of their business. Regardless, absent express assertion of advice of counsel as a defense,[198] the task is a difficult one.[199]

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[194] 730 A.2d 51 (Conn. 1999). Metropolitan Life is discussed at *supra* notes 95-107 and the accompanying text.

[195] *Metropolitan Life*, 730 A.2d at 60.

[196] *Id.*

[197] *See, e.g.*, Mortgage Guarantee & Title Co. v. Cunha, 745 A.2d 156, 159-60 (R.I. 2000); *see also Ex Parte* State Farm Fire & Cas. Co., 794 So. 2d 368, 373-76 (Ala. 2001) (embracing *Cunha* and, by extension, *Metropolitan Life*).

The obvious challenge facing courts is deciding whether documents sought to be protected as work product were prepared in anticipation of litigation. Such decisions are necessarily case-specific.[200] That said, and recognizing that insurers investigate claims in the ordinary course of their business and often involve attorneys in the process, the reality of today's litigation environment compels the conclusion that courts should liberally construe the anticipation of litigation requirement in favor of insurers. In the first-party context, an insurer and its insured become adversaries as soon as a claim is made.[201] An insurer can reasonably anticipate litigation if it denies a claim or pays less than the full amount of the loss claimed by the insured. Litigation is virtually certain if the claim at issue bears any hint of fraud or serious wrongdoing by the insured. In the liability insurance context, the insurer's investigation of the claim against its insured is certainly conducted with the expectation that, if the claim cannot be settled, litigation will follow.[202] With liability insurance there is always a threat of litigation.[203]

Courts hearing bad faith cases have generally been reluctant to find a waiver of work product immunity.[204] This is not surprising, for courts generally are reluctant to permit the discovery of ordinary or tangible work product, and the discovery of opinion work product is exceptionally rare, even when it is alleged to have been placed at issue.[205] This is also as it should be, for work product should never be easily discovered despite the type of litigation or the type of party.

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[198] *See* Minn. Specialty Crops, Inc. v. Minn. Wild Hockey Club, L.P., 210 F.R.D. 673, 679 (D. Minn. 2002) (holding that assertion of advice of counsel defense waives the defendant's work product immunity).

[199] *See* Chambers v. Allstate Ins. Co., 206 F.R.D. 579, 584 (S.D. W.Va. 2002) ("Determining whether specific documents are work product can be quite difficult, especially in litigation over insurance coverage decisions.").

[200] *See* Haynes v. Anderson, 597 So. 2d 615, 619 (Miss. 1992) ("In the end, a case by case approach is the only approach which seems to . . . make any real sense, even though paradoxically, insurance company investigations of accidents typically encompass 'routine' investigations with an 'eye toward litigation.'").

[201] State *ex rel.* Safeco Nat'l Ins. Co. of Am. v. Rauch, 849 S.W.2d 632, 634 (Mo. Ct. App. 1993).

[202] Silva v. Basin W., Inc., 47 P.3d 1184, 1191 (Colo. 2002).

[203] *Id.* at 1191-92.

[204] *See, e.g.*, Mordesovitch v. Westfield Ins. Co., 244 F. Supp. 2d 636, 642-50

V. CONCLUSION

In today's world of staggering bad faith verdicts, insurers sometimes may be tempted to raise advice of counsel as a complete or partial defense. More likely, however, their attorneys' advice will become an issue in cases for reasons other than their express reliance on it as some form of defense. If it does, an insurer may be held to have impliedly waived its attorney-client privilege with respect to related communications. Recent decisions from the Arizona, Delaware and Ohio supreme courts have found implied waivers on facts that do not necessarily support them, and these decisions have seriously and unfairly undermined insurers' attorney-client privilege in insurance bad faith and coverage litigation.

An insurer should be held to have waived its attorney-client privilege in a bad faith case only when it attempts to limit its liability by describing advice received from its attorney and by asserting that it relied on that advice. This approach, derived from the Third Circuit's decision in *Rhone-Poulenc Rorer Inc. v. Home Indemnity Co.*,[206] is by far the best of the several alternatives regularly employed by courts to determine whether a litigant has impliedly waived its privilege. More than any other, it promotes the fundamental purposes of the attorney-client privilege in this high-stakes litigation arena.

(S.D. W. Va. 2003); *Chambers*, 206 F.R.D. at 584-88; Dixie Mill Supply Co. v. Cont'l Cas. Co., 168 F.R.D. 554, 559 (E.D. La. 1996).

[205] *See* Cardtoons, L.C. v. Major League Baseball Players Ass'n, 199 F.R.D. 677, 684-86 (N.D. Okla. 2001) (discussing opinion work product and "at issue" waiver).

[206] 32 F.3d 851 (3d Cir. 1994).

PUNITIVE DAMAGES IN MISSISSIPPI: WHAT HAS HAPPENED, WHAT IS HAPPENING AND WHAT IS COMING NEXT

Judge Louis Guirola[*] *and*
Thomas L. Carpenter, Jr.[**]

I. INTRODUCTION

Following two landmark developments in the area of punitive damages, the United States Supreme Court decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*[1] and the Mississippi legislature's special session revisions of punitive damage statutes,[2] there has been a great deal of discussion from both tort reform advocates and trial lawyers as to the likely outcome of these legal developments.

Civil defense attorneys emphasize the United States Supreme Court's *State Farm* decision, which declares that constitutional rights against excessive awards must be preserved.[3] These attorneys, and the business interests they represent, have long asserted that large jury verdicts against corporations and professions such as medicine were harming the states involved, leading to legislation similar to Mississippi Code Annotated section 11-1-65 being passed in other states.[4] On the other hand, trial lawyer advocacy groups see the advent of legislative and judicially-enacted limits on punitive damage awards as very damaging to plaintiffs' rights, as recently noted:

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[**] Attorney, Carr, Allison, Crawley, Bagwell & Anderson, P.C.; Board of Trustees, American Inns of Court, Russell-Blass-Walker Chapter, Gulfport, Mississippi. Further, both Judge Guirola and I would like to extend our cordial appreciation to United States Magistrate Judge Sally Shushan, David Combe of Tulane Law School and the Tulane Law School Chapter, American Inns of Court, without which this article would not have been possible.

[1] 123 S. Ct. 1513 (2003).

[2] As codified in MISS. CODE ANN. § 11-1-65 (2002 & Supp. 2003).

[3] Dan W. Webb & Sherrie L. Moore, *United States Supreme Court Holds Punitive Damages Award in Insurance Bad Faith Case Excessive and Violative of the Fourteenth Amendment to the United States Constitution*, MDLA QUARTERLY, July 2003, at 5-6 ("[C]are must be taken to state and maintain the federal Constitutional defenses in the first pleadings through discovery . . . Otherwise, these defenses, though important in the defense arsenal, will not be properly preserved.").

> Harvard Law School professor Laurence Tribe, who argued against State Farm in the case before the Court, says, "There is no doubt that the six-justice majority has greatly tightened the noose on punitive damages."[5]

Another commentator bitterly wrote one month later in the same newspaper:

> [I]t is difficult to see why the Court felt the need to protect these hardly powerless defendants from the judgments of the citizens who heard the evidence and saw the witnesses in those cases. But that is now the law.[6]

On the philosophical plane of debate, the controversy is no less intense. David G. Owen, writing in the *Alabama Law Review*, noted that there were both Kantian and utilitarian rationales to support the imposition of punitive damages in some cases.[7] Owen asserts that under Kantian philosophy, a violation of one's personal space or rights is no less than a theft of the victim's autonomy, requiring not only the imposition of compensatory damages to make the victim whole but also the imposition of punitive damages to diminish "the worth and freedom of the thief in proportion to the worth and freedom stolen from the victim."[8] As for punitive damages and utilitarianism, Owen states:

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[4] Mark Ballard, *17-front Tort War*, NAT'L L.J., May 12, 2003, at 9 ("'We were becoming the bull's eye for law firms out of Alabama and Mississippi,'" said Ron Russell, president and CEO of the Arkansas Chamber of Commerce.").

[5] *Damage Control*, LEGAL TIMES, Apr. 14, 2003, at 10.

[6] Alan B. Morrison, *Your Money or Your Life—The Supreme Court Places More Value on the Purse Than on Personal Freedom*," LEGAL TIMES, May 19, 2003, at 67. Morrison noted that State Farm's prior out-of-state conduct, while now declared irrelevant for purposes of punitive damages, would specifically be permitted as a consideration in a "three strikes case," referring to *Ewing v. California*, 123 S. Ct. 1179 (2003). *Id.*

[7] David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705, 708-15 (1989). Owen also notes that various abuses of "power, truth and trust" support a need for the imposition of punitive damages. *Id.* at 716-22.

> [P]unishment is morally proper only if it is calculated to produce a net benefit for society in general, hopefully for the victim, and perhaps even for the wrongdoer. Punishment may make the victim and society more secure by providing them with a sense of confidence that future wrongdoers similarly will be held to account . . . . Punitive damages assessments [also] serve as an admonition, to the wrongdoer and others alike, that similar misconduct may be discovered and punished in the future.[9]

On the other side of the philosophical divide, James B. Sales and Kenneth B. Cole, Jr., point out the Biblical authority for the imposition of punitive damages, referring to the twenty-second chapter of *Exodus*, which provides multiple times damages for theft of livestock.[10] However, the authors note that only a minority of states, Louisiana, Massachusetts, Nebraska and Washington, do not recognize punitive damages as an available common law remedy.[11] Four other jurisdictions, Connecticut, Georgia, Michigan and New Hampshire, restrict the award to "nothing more than compensatory damages."[12]

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[8] *Id.* at 711. Owen noted that according to Kant, "autonomy, freedom of the will," was "the supreme principle of morality." *Id.* at 711 n.18 (citing IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (L. Beck trans., 1959) (1785)).

[9] *Id.* at 713-14. Owen notes a cautionary point that punitive damages are helpful under the assumption that "it does not deter more good activity than bad and that the transaction and other secondary costs of achieving the deterrence are exceeded by the beneficial results." *Id.* at 714 n.32. Owen also offers further discussion concerning deterrence "as a utilitarian goal," citing H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 128-29 (1968). *Id.* at 714 n.30.

[10] James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1119 n.4 (1984) (citing *Exodus* 22:1: "If a man shall steal an ox, or a sheep, and kill it, or sell it, he shall restore five oxen for an ox, and four sheep for a sheep."). If there were any doubt as to their perspective, their final introductory comment notes: "Responsible jurisprudence, however, argues forcefully in favor of relegating this *legal dinosaur* to an era that long since has passed." *Id.* at 1119 (emphasis added).

[11] *Id.* at 1125, n.43. Louisiana was the first state to dispense with punitive damages in 1932. *Id.* (citing McCoy v. Arkansas Natural Gas Co., 143 So. 383 (La. 1932)).

Moving on to their argument against punitive damages, Sales and Cole assert, "[t]he standards for measuring reckless or wanton conduct[13] are confusing and devoid of any effective definition [and] [s]cholars universally have acknowledged the absence of any meaningful characterization."[14] As the authors note, jurors "motivated by the noble desire to render a fair verdict simply cannot fathom the intricacies in meaning and subtle connotations that characterize the different standards for measuring reckless or wanton conduct," thus making every "defendant increasingly . . . subject to the vagaries of individual jurisdictions and an uninformed jury."[15] As a result of this problem, the authors foresee jurors returning punitive verdicts repeatedly for the same product "to punish a product supplier to the point of economic destruction . . . [noting] that the bankruptcy or other form of annihilation of a product supplier by the repeated imposition of punitive damage awards could be justified and judicially sanctioned."[16]

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[12] *Id.* at 1125. According to Sales and Cole, Georgia jurisprudence holds that awards for pain and suffering implicitly include a punitive damage element, thus greatly restricting their application. *Id.* (citing Westview Cemetery, Inc. v. Blanchard, 216 S.E.2d 776, 778-81 (1975)). This opinion has a prescient legal determination, in that this point was echoed in the *State Farm* opinion by Justice Kennedy, stating, "The compensatory damages for the injury suffered here, moreover, likely were based on a component which was duplicated in the punitive awards." State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1512, 1525 (2003).

[13] "Reckless and wanton" conduct is a necessary element for the imposition of punitive damages in Mississippi. MISS. CODE ANN. § 11-1-65 (2002 & Supp. 2003).

[14] Sales & Cole, *supra* note 10, at 1137. The authors note that other commentators, such as Dean Prosser and Professor McCormick, have asserted in their books that "antisocial conduct" justifying punitive damages lies in two categories: conduct intending to cause harm and conduct where the defendant should have known that his conduct would create "a strong probability—although not a substantial certainty" that harm would result. *Id.* at 1137 n.99. Sales and Cole assert that first, "[t]his characterization provides little illumination and even less meaningful guidance in applying the standard," and second that "[t]his strained effort to characterize conduct warranting punitive damages merely dramatizes the total unsuitability of the punitive damage concept in the arena of civil torts reparations." *Id.*

[15] *Id.* at 1138. The authors cite a Montana case where the judiciary acknowledged a lack of meaningful guiding standards for the determination of whether punitive damages were appropriate. *Id.* (citing Billings v. Transamerica Ins. Co., 679 P.2d 1217, 1222 (Mont. 1984)).

There is no doubt that the issue of punitive damages, as discussed by legal and business commentators, is and will continue to generate great controversy in both political and philosophical debates. Two questions are timely to the issue of punitive damages in Mississippi: How did we get here, and what has happened recently to change things? We will begin with a quick look at how punitive damages developed in English common law, and in the state of Mississippi, prior to 2002.

II. A BRIEF HISTORY OF PUNITIVE DAMAGES

A. *The Ancient and Medieval Precedent for Punitive Damages Through Its Development Under English Common Law Prior to the American Revolution*

Ancient societies had several unique ways to punish wrongdoers for conduct that contemporary society would view as non-criminal behavior. For example, in ancient Mesopotamia, a slave woman who cursed her mistress (presumably causing emotional distress) would have her mouth scoured with salt under the *Laws of Ur-Namma*.[17] The theory of compensation with money, as opposed to physical pain, is a concept which arose within Germanic and Frankish law as a means of ending disruptive and violent blood feuds.[18] This concept, known as a *wergeld*, accomplished the following:

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[16] *Id.* at 1142-43. The authors note that the Fifth Circuit refused to permit the "supplier annihilation" in the asbestos industry, if only to keep those defendants financially alive to pay other asbestos victims. *Id.* at 1143-44 (citing Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 526 (5th Cir. 1984) (interpreting Mississippi punitive damages and products liability law)).

[17] James Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law*, 76 B.U. L. REV. 29, 51 (1996) (citing LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR 20 (Martha T. Roth trans., 1995)). Roman legal precedent for supra-compensatory damages apparently arose as early as 450 B.C., with the codification of the Twelve Tables. Melvin S. Belli, Jr., *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 2 (1980) (citing H. LAWSON, NEGLIGENCE IN THE CIVIL LAW 60 (1950)).

[18] Lindgren, *supra* note 17, at 53 (citing THEODORE J. RIVERS, LAWS OF THE SALIAN AND RIPUARIAN FRANKS 15 (1986)).

> [I]n order to maintain peace between potentially feuding kindreds, a monetary payment called the *wergeld* or *leodgeld* was instituted, which compensated the victim's kin with a payment equal to the victim's status within Frankish society. The *wergeld* was equivalent to a person's legal value . . . When the victim's kin accepted payment of the wergeld, the feud ceased, at least in theory.[19]

In medieval Europe, there was no need for civil garnishment. As the *Laws of Hywel Dda* explain:

> If it happens that he has not the whole payment, . . . though only one penny be wanting, he is killed for that one by his enemies, they have committed no illegality, since the complete cannot come from the incomplete.[20]

Thus, under our ancestral common law, there was precedent for compensatory damages by roughly A.D. 1000 in England. The English scholar Britton noted in the 1290s that the writ of trespass, which encompassed everything from a slap on the wrist to actual murder, evolved to permit physically weaker victims the right of trial by jury and compensation for the offense, a better option for many than the trial-by-battle alternative for civil litigants in thirteenth-century England.[21]

From this writ of trespass grew the foundation of punitive damages in our common law, in that:

> [J]udgments in pleas of trespass required defendants to make reasonable satisfaction to plaintiffs, and also imposed corporal

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[19] *Id.* at 53-54 (citing Rivers, *supra* note 18, at 15). It should be noted that the governing authority, notably King Clovis, issued these laws, including the *wergeld* system of compensation, in a sixty-five title Latin codification, known as the *Pactus Legis Salicae* between A.D. 507-511, a mere thirty-five years after the fall of the Roman Empire in A.D. 476. *Id.* at 53 n.110.

[20] *Id.* at 45 (citing THE LAW OF HYWEL DDA 146 (Dafydd Jenkins ed. & trans. 1986)). What is more interesting is that the *wergeld* system of compensation had by A.D. 928 made the migration to England, since the Welsh codified this law between A.D. 928 and A.D. 1200. *Id.* at 45.

[21] David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 70 (1996) (citing BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 155 (George E. Woodbine Ed. & Samuel E. Thorne trans., 1977-1982) and BRITTON 1:123 (Francies M. Nichols ed., 1865)).

> punishments such as imprisonment, which could be redeemed by a ransom in money.[22]

However, by 1300, English courts were focused on writs and lost the distinction between criminal and civil actions, not to reutilize those terms until approximately 1500 when Roman legal precedent returned to favor, and that interest "reintroduced the grand divisions of criminal law and civil law in the sixteenth century."[23] Motivated by the concept of civil fault with a compensatory and punitive damage award possible, rather than the "King's Justice," Thomas Marowe stated to his fellow law students and lawyers at the Inner Temple, English Inns of Court, in 1502, that:

> [I]f someone has taken my goods feloniously, I can if I please treat that felony as a mere trespass, and so can the king if he pleases.[24]

Needless to say, the writ of trespass, which developed into the area of personal injury inside the "grand division" of civil law, is now the sole legal remedy for righting wrongs within civil law, since arranging for personal injury to be visited on the wrongdoer by the King is no longer an option.[25] However, punitive damages still fulfill the vengeful role of the old appeals of felony, about which commentators have noted:

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[22] *Id.* at 70 n.75 (citing *The Mirror of Justices*, 7 SELDEN SOCIETY 142-44 (William J. Whittaker ed., London 1895)).

[23] *Id.* at 81. For that reason, English Year Book reports on legal matters feature little use of the word "crime." *Id.* at 81 n.140.

[24] *Id.* at 83 (citing BRACTON, 119b (2:337), 125b (2:353)).

[25] Those remedies called appeal of felony, which permitted trial by battle and tortuous punishments such as amputation against the wrongdoer, or indictment by felony, which involved a jury trial and much the same remedy, are described by legal commentators as a vengeful remedy as opposed to the compensatory remedy created by the writ of trespass. *Id.* at 61-68 (describing appeal of felony); 68-72 (describing indictment of felony). However, it should be noted with some humor that bringing an appeal of felony, a criminal charge with grievous potential harm to the tortfeasor, and then attempting to settle the appeal, to withdraw it upon permission from the King, frequently led to better monetary settlements than by going to trial on writ of trespass for monetary damages alone. *Id.* at 79 (citing Christopher Whittick, *The Role of the Criminal Appeal in the Fifteenth Century*, LAW AND SOCIAL CHANGE IN BRITISH HISTORY 55, 63-65 (J.A. Guy & H.G. Beale eds. 1984)).

> Compensation for many torts has come to include punitive damages, among others, on the ground that victim-consumers need a powerful tool to protect themselves against powerful suppliers, and on the ground that punitive damage awards may have a healing effect on the victim beyond that which compensatory damages would effect. This is the language of revenge.[26]

With that information in mind, it is appropriate to discuss when the first landmark case of punitive damages came into being. In 1763, during the reign of King George III,[27] and in the Michaelmas term of court, the case of *Huckle v. Money*[28] arose before the King's Bench. The plaintiff, a "journey-man printer . . . was taken into custody by the defendant (a King's messenger)," apparently for the offense of having printed a newspaper, *The North Briton*, No. 45.[29]

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[26] Tamar Frankel, *Lessons from the Past: Revenge Yesterday and Today*, 76 B.U. L. REV. 89, 96-97 (1996). Indeed, scholars note that punitive awards serve a victim's need to be respected and to feel equivalent to the victimizing tortfeasor. Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 KAN. L. REV. 39, 50-51 (1994).

[27] King George III was a king whose governmental "Injuries and Usurpations" were not apparently confined to what became known as the United States. THE DECLARATION OF INDEPENDENCE para. 2. (U.S. 1776).

[28] 95 Eng. Rep. 768 (K.B. 1763). This case arose, in accordance with English legal precedent, as an action in trespass. *Huckle*, 95 Eng. Rep. at 768. The Fourth Circuit cited *Huckle v. Money* as precedent for the idea that punitive damages are an issue to be decided "in a court of law." Shamblin's Ready Mix, Inc. v. Eaton Corp., 873 F.2d 736, 740 (4th Cir. 1989), *overruled by* Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co., 938 F.2d 502 (4th Cir. 1991).

[29] *Huckle*, 95 Eng. Rep. at 768. The British practice of arresting or imprisoning printers for publishing the news was likewise a common occurrence on both sides of the Atlantic. *See* United States v. Renfroe, 634 F. Supp. 1536, 1549 (W.D. Pa. 1986) (citing NEW ENCYCLOPEDIA BRITTANICA Vol. 5, pg. 661 (15th ed. 1985)). The court noted by way of discussing jury nullification that:

> Peter Zenger was charged with the criminal libel of the colonial governor of New York. The case was tried in 1735 in New York . . . Since truth was not a defense under the existing law, the trial judge refused the defendant's request that the jury be instructed that they should acquit if they found that Peter Zenger wrote the truth. Nevertheless, Andrew Hamilton, counsel for Zenger, argued that notwithstanding the law the jury should acquit the defendant, because he wrote the truth. The jury acquitted the defendant.

Id.

The detention itself was not so bad since the messenger only kept Huckle in custody for six hours, and "used him very civilly by treating him with beef-steaks and beer, so that he suffered very little or no damages."[30] The messenger attempted to defend himself by asserting the right to arrest Huckle, but the King's Bench ruled the general warrant invalid; the jury awarded "300l. damages."[31]

From that award, controversy began. Serjeant Whitaker, a barrister, requested that the award be set aside upon the grounds that the printer himself earned only a guinea weekly and that the confinement was brief and pleasant, "so that 300l. were most outrageous damages in this case," requiring a new trial.[32] On the other hand, Serjeant Burland argued for the plaintiff that in "cases of tort, which found merely in damages . . . the Court will never interpose in setting aside verdicts for excessive damages," so the court should affirm the jury verdict.[33]

The Lord Chief Justice stated that the court must examine all of the facts in determining a motion for new trial on damages, and he noted that, "the measure is vague and uncertain, depending upon the vast variety of causes, facts and circumstances."[34] The court also noted its disfavor for granting a new trial, particularly for torts, because "the Courts interfering in these cases would be laying aside juries."[35] The court invalidated the Secretary of State's warrant directing the arrest of the printers and publishers of the paper and disapproved of the Treasury's solicitor arguing in its defense, "in a tyrannical and severe manner."[36] However, the court conceded that the jury's award was punitive because "if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20l. damages would have been thought damages sufficient."[37]

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[30] *Huckle*, 95 Eng. Rep. at 768. In fact, because the detention was so short and so relatively enjoyable, the subsequent verdict became controversial.

[31] *Id.* The general warrant by the Secretary of State to arrest those publishers and printers was discussed "at length" in another case, *The King and Wilkes*, Easter term, 3 Geo. 3. *Id.*

[32] *Id.* He noted that in a prior malicious prosecution case, Chambers v. Robinson, 1 Stra. 691, "the jury gave 1000l. damages, and the Court granted a new trial for the excessiveness of the damages." *Id.*

[33] *Id.* For his part, Serjeant Burland cited *Leeman* against *Allen and Others, Reforming Constables*, C.B., which "in an action of trespass and imprisonment, the jury gave 300l. damages; and this Court refused to grant a new trial, though the plaintiff had not been imprisoned above 24 hours." *Id.*

[34] *Id.* The court further noted that "torts or injuries which may be done by one man to another are infinite." *Id.*

[35] *Id.* The court also pointed out that it did not always have the power to set aside jury verdicts, in that "[b]efore the time of granting new trials, there is no instance that the Judges ever intermeddled with the damages." *Id.*

However, in a remarkably strong defense of civil liberty, a hallmark of the American Revolution to begin only twelve years later, in 1775, the court noted:

> that striking light of which the great point of law touching the liberty of the subject (printer) appeared to them at the trial; they saw a magistrate all over the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them.[38]

For that reason, the court held that the jury's award of what were in essence punitive damages was appropriate, stating:

> I cannot say what damages I should have given if I had been upon the jury; but I directed and told them they were not bound to any certain damages against the Solicitor-General's argument. Upon the whole, I am of opinion the damages are not excessive.[39]

Thus, the stage was set under English and American common law for punitive damages to enter into American jurisprudence.[40]

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[36] *Id.* at 769. The Secretary's warrant was deeply disapproved, as the court stated, "[t]o enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition." *Id.*

[37] *Id.* at 768-69. The court noted that there was but "small injury done to the plaintiff," and that he was but a poor printer, considering "the inconsiderableness of his station and rank in life." *Id.* at 769.

[38] *Id.* at 769. The court noted that this state of legal affairs was "a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject." *Id.*

[39] *Id.* While doing so, the court gave a long-standing precedent for modern day practitioners seeking to avoid a new trial, holding that "it is very dangerous for the Judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages." *Id.*

B. Early American and Mississippi Jurisprudence on Punitive Damages in the Eighteenth and Nineteenth Centuries

This article will discuss American and Mississippi jurisprudence, first addressing early American, and then our own state's developments for punitive damages, as well as a discussion of the federal courts' perspective on the issue of punitive damages from 1990 to the present date.

1. Early American Jurisprudence

The introduction of punitive damages did not take long to find application in American common law. As noted above, the first landmark punitive damages case in England, *Huckle v. Money*, was decided in 1763. A mere twenty-eight years later, during the ratification of the United States Constitution, the New Jersey Supreme Court heard the case of *Coryell v. Colbough*.[41] This case featured the first jury instruction on a punitive damage assessment, stating that "they were not to estimate the damages by any particular proof of suffering or actual loss," but rather "damages for *example's* sake, to prevent such offenses in future."[42]

The United States Supreme Court followed the legal precedent of punitive damage assessments in the nineteenth century during its disposition of the curiously named case, *THE AMIABLE NANCY*.[43] AMIABLE NANCY involved piracy and privateering, featuring the owners, cargo and crew of *Amiable*

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[40] However, English jurisprudence has abandoned punitive damages as a recovery, at least since 1964. Belli, *supra* note 17, at 4 (citing Rookes v. Barnard, 1 All E.R. 367 (1964)).

[41] 1 N.J.L. 90 (1791). This reporter is fully entitled Richard S. Coxe, Reports of Cases Argued and Determined in the Supreme Court of New Jersey: from April term 1790 to November term 1795, Both Inclusive (Allinson, Burlington, N.J. 1816).

[42] *Id.* at 91. The Supreme Court of New Jersey further stated that the damages should equal "a sum as would mark their disapprobation, and be an example to others." *Id.*

[43] 16 U.S. (3 Wheat.) 546 (1818).

Nancy, a Haytian schooner, against an American privateer, which boarded her in the Caribbean in October 1814.[44] Unfortunately for *Amiable Nancy*, the American privateers who boarded and detained her as a prize destroyed her papers, resulting in her second detention as prize cargo by the British upon her arrival in Antigua.[45]

Justice Story, writing for the Court, held that this act of piracy had no justification under American law, and further:

> Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wonton outrage, without any just provocation or excuse. Under such circumstances, the honour of the country, and the duty of the court, equally require that a just compensation should be made to the unoffending neutrals, for all the injuries and losses actually sustained by them. And if this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct.[46]

However, the Court made a distinction between the privateers who boarded *Amiable Nancy,* and those who merely owned the vessel *Scourge*, but did not take part in the boarding:

> But it is to be considered, that this is a suit against the owners of the privateer . . . . They are innocent of the demerit of this transaction . . . . Under such circumstances, we are of opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages.[47]

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[44] THE AMIABLE NANCY, 16 U.S. (3 Wheat.) at 546-47. The defendant privateer was the aptly named *Scourge*. *Id.*

[45] *Id.* at 549-50. *Amiable Nancy* had to be towed from Antigua because of its deterioration during detention, costing her owners a total of $15,000. *Id.* at 550. Presumably, *Amiable Nancy* was not so amiable after this ordeal.

[46] *Id.* at 558. The Court thought it was its responsibility to "punish offenders," without defeating the use of privateers as a policy of the federal government during war. *Id.* at 559.

[47] *Id.* at 558-59. This is perhaps analogous to the modern-day tort of negligent entrustment in which, for instance, courts see a distinction between a reckless teenager who has an accident and the father who loans a car to the teenager knowing his son's tendency to drive recklessly.

The United States Supreme Court expanded this view of punitive damages beyond admiralty in 1851 in a case of trespass where the owner of a dam took down part of another's dam without permission; the jury found the action unjustified and awarded two hundred dollars, a sum which was more than the cost of repair.[48] The United States Supreme Court, in affirming this application of punitive damages, stated that:

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon "a" defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument.[49]

Accordingly, the Court noted that in certain cases "where the injury has been wanton and malicious, or gross and outrageous," courts permit not only an award of compensatory damages, but also "something farther by way of punishment or example, which has sometimes been called 'smart money.'"[50] The *Day* Court noted, in affirming the verdict, that punitive damages had their origin in the civil law of admiralty and found ample precedent in other civil law categories for an award beyond compensatory damages to plaintiffs in general trespass actions as well.[51]

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[48] Day v. Woodworth, 54 U.S. (13 Howard) 363 (1851). The defendant was fortunate in that the jury originally returned a verdict of one thousand dollars, but the trial court sent the jury back for further deliberation, over the strenuous objections of the plaintiff. *Day*, 54 U.S. (13 Howard) at 366-68.

[49] *Id.* at 371. The Court further noted, "In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory." *Id.*

[50] *Id.* at 371. This expression presumably is the foundation of a girlfriend's extra purse money which she keeps for when her boyfriend does something egregious, like leaving her stranded, so that she can get home using her "smart money."

However, in 1858, the United States Supreme Court reversed an award of punitive damages.[52] The Court held that a jury instruction on punitive damages was improperly given because "the rule of damages is not accurately stated to the jury."[53] The Court stated that the precedent of *Day*:

> [R]ecognised [sic] the power of a jury in certain actions of tort to assess against the tort-feasor punitive or exemplary damages. Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are [sic] not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person.[54]

In distinguishing *Day* from the case before it, and remanding the case back to the trial court with instructions against providing a punitive damage instruction, the Court stated:

> But the malice spoken of in this rule (*Day*) is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations. Nothing of this kind can be imputed to these defendants.[55]

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[51] *Id.* at 372-73. The *Day* Court cited examples of patent actions and actions on debt, which in common law permitted recovery of attorney's fees expended in prosecuting the action, as examples of supra-compensatory recovery. *Id.*

[52] Philadelphia, Wilmington & Baltimore R.R. Co. v. Quigley, 62 U.S. (21 How.) 202 (1858). This suit arose from a libelous statement made by the president and officers of the railway company to its stockholders, concerning the actions of one of the company's officers. *Philadelphia, Wilmington & Baltimore R.R. Co.*, 62 U.S. (21 How.) at 202.

[53] *Id.* at 213. The Court also found the alleged libelous communication, for which the trial court authorized the punitive damages instruction, was made after the commencement of the suit, and, therefore, the punitive damages instruction was in error. *Id.*

[54] *Id.* at 213-14. Malice creates a circumstance in which punitive damages are appropriate. *Id.* at 214.

[55] *Id.* The libelous letter itself, far from doing the plaintiff damage, was found to have given the plaintiff "an advantage from the investigation by the company." *Id.* As such, the Court noted that the circumstances of the investigation and letter "repel the presumption of the existence of malice on the part of the corporation, and so the jury should have been instructed." *Id.*

In 1885, twenty years after the end of the Civil War and the subsequent passage of the Fourteenth Amendment to the United States Constitution,[56] the United States Supreme Court addressed due process and equal protection challenges to a Missouri statute which imposed supra-compensatory damages, in the amount of double damages, for cattle or other livestock injured on the railway where the railroad company failed to keep its railway fencing in good order.[57] Counsel for the railway made the point that:

> The court below cite [sic] a large number of State laws providing double damages or other penalties as upholding the constitutionality of this statute. By examination thereof it will be found that they all relate to acts of wilful [sic] wrong, things forbidden by positive law, and equally obnoxious to good morals and natural right. Such is not this case. The decision and opinion in *Atchison & Nebraska Railroad Co. v. Baty*, 6 Neb. 37, is in point. It is there held that "the excess beyond the damage sustained, whatever it may be, is so much property taken from one person and given to another." The statute is further obnoxious on the ground that it applies only to railroad corporations, and not to individuals operating railroads.[58]

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[56] The Fourteenth Amendment guarantees to state citizens both due process and equal protection of the laws by stating, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONSTITUTION amend. XIV § 1. As noted below, the nineteenth century United States Supreme Court faced difficulty enforcing this Amendment's provisions. *See infra* note 60.

[57] Missouri Pac. R.R. Co. v. Humes, 115 U.S. 512 (1885). The Missouri legislature enacted this law in 1875 to protect landowners' cattle and other livestock, negating the liability as well for the railroad as long as the fence work was not "negligently or wilfully done." *Missouri Pac. R.R. Co.,* 115 U.S. at 513-14.

[58] *Id.* at 518. In other words, the Missouri Pacific Railway Co. was complaining that it was being deprived of additional money beyond compensation on a mere negligent standard, which is a penal statute by nature, without the *mens rea* of intent. The equal protection argument would founder today under the rational basis standard applied to cases in which governmental action does not impact a suspect class. Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).

The United States Supreme Court disagreed, emphasizing the many actions of the State which devalue both real and personal property of its citizens, even "heavy and oppressive burdens (which) are imposed by statute upon residents of cities and counties" for taxes and improvements, which on occasion can "seriously depreciate the value of property."[59] The Court continued, noting in rejection of the railroad's argument:

> Yet, if no rule of justice is violated in the provisions for the enforcement of such a statute, its operation, in lessening the value of the property affected, does not bring it under the objection of depriving a person of property without due process of law. It is hardly necessary to say, that the hardship, impolicy, or injustice of State laws is not necessarily an objection to their constitutional validity. . . This court is not a harbor where refuge can be found from every act of ill-advised and oppressive State legislation.[60]

In support of its position that there was precedent for affirming this legislation, that punitive damages were permitted, the Court noted:

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[59] *Mo. Pac. R.R. Co.*, 115 U.S. at 520. The Court noted that the remedy for "evils of that character is to be sought from State legislatures." *Id.*

[60] *Id.* at 520-21. This decision, which quickly dismisses the railroad's arguments, should be read in the context of other United States Supreme Court jurisprudence of the time, in which the Court was quite loathe to find that anyone's Constitutional rights had been violated by state legislation. For example, *The Slaughterhouse Cases,* 81 U.S. 36, 81 (16 Wall.) 36 (1873) held that the Fourteenth Amendment (now held to guarantee all persons both due process and equal protection of the laws) only applied to protect certain federal constitutional rights of African-American citizens, as opposed to state constitutionally created rights, thus permitting the establishment of a state-sponsored slaughterhouse monopoly throwing common meat packers out of work. The infamous case of *Plessy v. Ferguson*, 163 U.S. 537 (1896), held that while the Fourteenth Amendment may have been enacted to "enforce the absolute equality of the two races," it did not "intend to abolish distinctions based upon color," proving that the Fourteenth Amendment, as construed by the Supreme Court of that era, did not always protect African-Americans. Seven years before *Plessy*, the Mississippi Supreme Court held that a state statute requiring separate but equal railway accommodations did not violate the Commerce Clause, as long as the railway trip was entirely within the State of Mississippi. Louisville New Orleans & Texas R.R. Co. v. State, 6 So. 203, 204-05 (Miss. 1889).

> [I]n England and in this country, they have been allowed in excess of compensation, whenever malice, gross neglect, or oppression has caused or accompanied the commission of the injury complained of. "The law," says Sedgwick in his excellent treatise on damages, "permits the jury to give what it terms punitory, vindictive, or exemplary damages; in other words, blends together the interests of society and of the aggrieved individual, and gives damages, not only to recompense the sufferer but to punish the offender". . . . For injuries resulting from a neglect of duties . . . juries are also permitted to assess exemplary damages. These may perhaps be considered as falling under the head of cases of gross negligence, for any neglect of duties imposed for the protection of life or property is culpable, and deserves punishment.[61]

The Supreme Court quickly dismissed the equal protection argument asserted by the railway company stating, "The statute makes no discrimination against any railroad company in its requirements. Each company is subject to the same liability."[62] Thus, the *Missouri Pacific Railway. Co.* Court affirmed the trial court's enforcement of the statute without dissent.[63]

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[61] *Mo. Pac. R.R. Co.*, 115 U.S. at 521. The weakness of the Court's decision is reflected in the railroad company's argument—that all of the cited authorities, including *Day v. Woodworth*, required gross negligence or intentional misconduct, an element seriously lacking here since negligence alone would trigger application of the penalty. A better justification would later be argued for administrative penalties, such as statutory penalties for losing appellate parties, and affirmed as part of the State's powers in addressing a "legitimate state interest." Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 80-85 (1986) (holding that under rational basis standard, statute is "presumed to be valid and will be sustained if the classification . . . is rationally related to a legitimate state interest"). The court found that the penalty statute rationally relates to the state interest in ensuring that a wealthy losing party does not use the appellate process to squeeze a settlement out of the less well-off winning party at trial. *Crenshaw*, 486 U.S. at 81-82. However, the difference in the conduct being required to trigger supra-compensatory damages is nevertheless troubling and topical to today's punitive damages problem as it relates to contract-based causes of action.

[62] *Mo.-Pac. R.R. Co.*, 115 U.S. at 523. The railway company's counsel however, centered his argument on the point not that his railway company was being treated differently than other railway companies but different than all other companies or other persons under the law, by asserting "it applies only to railroad corporations, and not to individuals operating railroads." *Id.* at 518. The Supreme Court's opinion as stated totally missed the railway counsel's point, by design or oversight.

The development of punitive damages had a long pedigree by 1885, as the nation was heading into the Gilded Age. Meanwhile, by 1885, the State of Mississippi was over sixty years old, had begun as a federal state, seceded into a confederate state, and was readmitted back as a federal state. As such, this year is an appropriate stopping point for refocusing back upon the development of punitive damages law in the State of Mississippi.

2. Nineteenth and Early Twentieth Century Mississippi Jurisprudence on Punitive Damages

Mississippi was formed as a state in 1817.[64] In 1840, a mere twenty-three years after the state's incorporation, the first case mentioning exemplary damages arose.[65] However, in that case, no such damages were affirmed by the Mississippi Supreme Court.[66]

In 1854, a defendant made one of the first attacks on a punitive damages award, which was upheld by the Mississippi Supreme Court.[67] The *Lewis* court found that the defendant had accused the plaintiff of perjury in a "magistrate's court" case, which qualified not only as perjury, but additionally:

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[63] *Id.* at 523-24. A case with identical facts, Missouri Pacific Railway Co. v. Terry, was likewise affirmed. *Id.*

[64] Cinque Bambini P'ship v. State, 491 So. 2d 508, 512 n.2 (Miss. 1986). The Mississippi Supreme Court noted the specific federal statute authorizing the establishment of the State of Mississippi, stating: "The Act of March 1, 1817, authorizing the formation of the State of Mississippi provided that the new state should be admitted into the Union upon the same footing with the original states in all respects whatever. *Cinque Bambini P'ship*, 491 So. 2d at 512 (citing 3 Stat. 348 (1817)). "The conditions of the March, 1817, enactment having been met, the Congress of the United States on December 10, 1817 formally admitted Mississippi into the Union." *Id.* A great addition to the development of historical research on punitive damages in Mississippi was published several years ago by John G. Corlew entitled *The Pursuit of Deep Pockets: An Historical Overview of Punitive Damages in Mississippi*, 63 MISS. L.J. 583 (1994).

[65] Newell v. Hamer, 5 Miss. 684 (1840). The case involved a breach of contract and alleged fraud. *Newell*, 5 Miss. at 692-93.

[66] *Id.* The *Newell* court held that there was not a sufficient breach of contract to support a statutory award of exemplary damages, which the appellant's counsel suggested was required by an 1837 statute in these circumstances. *Id.* at 684-85.

[67] Lewis v. Black, 27 Miss. 425 (1854). As the *Lewis* court noted, "This was an action of slander brought in the circuit court of Noxubee county," in which Lewis accused Black of perjury. *Lewis*, 27 Miss. at 431.

> The action was brought on the statute which declares that all words are actionable, "which, from their usual construction and common acceptation, are insults, and lead to violence and breach of the peace."[68]

Finally, the *Lewis* court discussed its unwillingness to set aside jury verdicts for excessiveness:

> The courts have no authority to set aside a verdict in actions under the statute, on account of alleged excess in the damages awarded by the jury. The statute provides expressly that the jury in such cases shall "be the sole judges of the damages sustained." The last exception was therefore not well taken, were it even admitted that the damages were disproportioned to the injury inflicted.[69]

As Mississippi jurisprudence developed, standards arose concerning a jury's proper formulation of damages. In 1854, the Mississippi Supreme Court stated that the financial condition of the defendant was valid information for the jury in deciding punitive damages, because a punitive damage amount to one poorer defendant would be a trifling amount to a richer defendant.[70]

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[68] *Id.* at 435. The insults at issue were not merely hurtful but could have lead to a duel between the parties, a practice decried by the Mississippi Supreme Court as the "evil practice of duelling" in 1843. Brien v. Williamson, 8 Miss. 14, 18 (1843).

[69] *Lewis*, 27 Miss. at 436. This hesitance to set aside jury verdicts for excessiveness still exists today. As the court recently noted:

> The jury's award is not to be set aside unless it is entirely disproportionate to the injury sustained. However, when determining the reasonableness of an award, the "sky is not the limit." The court looks to see whether the verdict is so excessive it shocks the conscience evidencing a bias, passion and prejudice on the part of the jury.

Gatewood v. Sampson, 812 So. 2d 212, 223 (Miss. 2002) (citations omitted).

[70] Bell v. Morrison, 27 Miss. 68, 86 (1854). The *Bell* court specifically stated:

> The damages which would operate as a proper punishment to one man

Two years later, the Mississippi Supreme Court addressed one of the first cases involving punitive damages for gross negligence.[71] The Mississippi Supreme Court noted that railways are subject to the same laws as all citizens.[72] Further, the court held that under the circumstances a punitive damages award was appropriate; however, the court plainly acknowledged that the dividing line between intentional or wilful conduct and gross negligence is difficult to distinguish.[73] Never-

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> might be inadequate to that effect upon another, by reason of their difference in pecuniary condition; and on the contrary, a verdict that would be scarcely regarded by a wealthy man, might be ruinous to a poor man. Hence the necessity, if the principle of exemplary damages be sound, to inquire into the pecuniary condition and circumstances of the defendant, in order, if the jury consider the case worthy of being made an example of, that the verdict may at once be adequate to the injury done to the plaintiff and to society, and just and reasonable to the defendant.

Bell, 27 Miss. at 86.

[71] Vicksburg & Jackson R.R. Co. v. Patton, 31 Miss. 156 (1856). The circumstances of this case were almost identical to the *Missouri Pacific R.R. Co.* case heard by the United States Supreme Court almost thirty years later, in that it involved a railroad striking and killing several horses and mules grazing along the path of the train. *Vicksburg & Jackson R.R. Co.*, 31 Miss. at 177.

[72] *Id.* at 181-82. The court noted that the railway had the right to operate, but that right is to be "exercised in subordination to the general laws and policy of the State." *Id.*

[73] *Id.* at 198. The court cited English precedent in acknowledging this problem, stating:

> And it is immaterial whether the jury thought there was gross neglect or wilful mischief. The rules above stated apply equally to either state of the case, and would warrant the jury in finding exemplary damages, if the circumstances of neglect or aggravation tended to justify it, and they thought fit to award it. In the last case cited, Lord Denman says, "Between wilful mischief and gross negligence the boundary line is hard to trace: I should rather say, impossible. The law runs them into each other; considering such a degree of negligence as some proof of malice." *Lynch v. Nurdin*. And upon the same principle, the numerous cases, whether of gross negligence or wanton wrong have proceeded, in which exemplary damages have been awarded. For it matters but little to a party injured, whether the wrong be done with a malicious intent, or by gross violation or neglect of duty.
>
> It must be taken, then, that the verdict of the jury settles the question, that there were circumstances of aggravation tending to show gross negligence, or a wanton and reckless disposition to injure or destroy the plaintiff's property. And it is well settled, that if the property was destroyed under such circumstances, exemplary damages may be awarded.

theless, under these circumstances, the court allowed punitive damages, because there were sufficient facts to persuade the jury that the railway's conduct was either gross negligence or intentional misconduct.[74]

In 1869, the Mississippi Supreme Court cautioned trial courts about the issuance of punitive damage instructions.[75] In an 1871 landmark opinion,[76] the court summarized existing punitive damage jurisprudence,[77] then further explained:

> The supreme court, in Morse v. Auburn and Syracuse Railroad Co., 10 Barb. 621, observe: "Exemplary or punitory dam-

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Id. (citations omitted).

[74] *Id.* at 197. As the court noted:

> The question of gross negligence or wanton mischief was distinctly submitted to the jury, and was a material part of the case; and whether we consider it with respect to the bad condition of the track and the absence of appliances and fence necessary for its safe operation, or the unfitness and recklessness of the engineer, it is plain that the jury were at liberty from the evidence, to find that the injury was occasioned either by the gross neglect of the company, or the wanton mischief of the engineer.

Id.

[75] New Orleans, Jackson & Great Northern R.R. v. Statham, 42 Miss. 607, 626 (1869). The Mississippi Supreme Court, in a near-prophetic statement, further cautioned trial courts:

> The learned Supreme Court of the State of Pennsylvania, in a recent case . . . in noticing the tendency of juries to inflict heavy damages upon corporations, uses this language: "Generally speaking, the influence of the court, in this class of cases, should be exerted to restrain those excesses into which juries are apt to run . . . Wild verdicts are frequently rendered. And the tendency in modern times *undoubtedly is to excessive damages, especially when they are to be assessed against corporations and railroad companies.*"

New Orleans, Jackson & Great Northern R.R., 42 Miss. at 626-27 (quoting Pennsylvania R.R. Co. v. Kelly, 7 Casey [Pa.] 373) (emphais in original).

[76] Memphis & Charleston R.R. v. Whitfield, 44 Miss. 466 (1871). This case demonstrates the pervasiveness of the railroad industry in the lives of Mississippians during this era. *See supra* notes 74-75.

[77] *Memphis & Charleston R.R.*, 44 Miss. at 488-502. The Mississippi Supreme Court summarized its own cases on the subject, such as *Vicksburg & Jackson R.R. Co. v. Patton*, 31 Miss. 156 (1856), United States Supreme Court precedent, such as *Day v. Woodworth*, 54 U.S. (13 Howard) 363 (1851), and numerous contemporary legal commentators of the time such as "Sedgwick, Angel, Pierce, Redfield, Sherman & Redfield." *Id.* at 489.

> ages, or 'smart money,' as they are often called, are given by way of punishment, for intentional wrong, and to operate as an example to others. The law, in such cases, looks beyond the act and its injurious consequences, to the motive, and metes out its punishments to that also. In such cases, the compensation for the actual pecuniary damage is rather subsidiary and incidental. There, the mental suffering, the injured feelings, the sense of injustice, of wrong, or insult, on the part of the sufferer, enter largely into the account, and the measure of justice is graduated by that of the offender's turpitude.[78]

In 1892, the Mississippi Supreme Court noted that mental suffering was an element of compensatory, not punitive damages,[79] and further noted the purpose of punitive damages by way of reference, by calling them vindictive damages.[80]

The issue of bad faith and punitive damages came up only twice in the 1800s. The first case, in 1856, involved a steamship which failed to arrive in Pascagoula on its scheduled arrival date.[81] The Mississippi Supreme Court held that in addition to a breach of contract being actionable, there may be punitive damages awarded where an independent tort can be asserted:

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[78] *Id.* at 497. The Mississippi Supreme Court again announced the standards for an award of punitive damages, stating:

> Punitory damages are allowed, where the act causing the injury has been willfully done; where the circumstances show a deliberate, pre-conceived, or positive intention to injure, or that reckless disregard of the safety of person or property, which is equally culpable. Exemplary, vindictive or punitive damages can never be recovered in actions upon anything less than gross negligence.

Id. at 494 (citations omitted).

[79] Bonelli v. Bowen, 11 So. 791, 792 (Miss. 1892) ("The mental suffering of appellee, the jury was clearly and properly informed, was an element to be considered by it in estimating the compensatory damages to be awarded the appellee.").

[80] *Bonelli*, 11 So. at 791. This case was one of few cases regarding punitive damages in the 1800s that did not involve a railroad. In many ways, the insurance companies of the twenty-first century had their counterparts, railway companies, in the nineteenth century.

[81] Heirn v. M'Caughan, 32 Miss. 17 (1856). The plaintiffs alleged that the bad faith failure of the steamship company to perform its contract caused personal injury. *Heirn*, 32 Miss. at 39.

> The objection to the rulings of the court, upon these instructions, assumes that the action was founded on the *special contract* of the mail line company. We have above seen that such is not a proper view of the nature of the action, which is one of *tort* for the personal grievance done to the plaintiffs by fraud, gross negligence or oppression. And in such cases, it is now too well settled to admit of controversy, that the jury may, in their discretion, award such damages by way of punishment, or for the sake of example, as they may think that the peculiar circumstances of the wrong to the plaintiff justifies.[82]

Thus, by 1900, there was a significant body of punitive damages caselaw in Mississippi, which in many ways mirrored our own contemporary punitive damages jurisprudence, including the heightened tort requirement of gross or wanton negligence or intentional misconduct and including the relevance of wealth for purposes of assessing punitive damages. The bad faith cause of action in pursuing quasi-contractual tort claims was also in place. Not much changed through 1950, as *Simonton v. Moore* demonstrates.[83]

In *Simonton*, the Mississippi Supreme Court rejected the plaintiff's argument that the requisites were met for the imposition of punitive damages; the court found no "proof of malice or wantonness," and no "wilful or malicious motive" necessary to justify punitive damages.[84] Importantly, the language triggering imposition of punitive damages, "wilful," "malicious" and "wanton," remained unchanged from 1850 with little or no apparent intervention by the Mississippi legislature to regulate its judicially-supervised administration. All of this, however, was about to change.

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[82] *Id.* at 49. This statement is the foundation of the independent tort requirement in bad faith today. State Farm Fire & Cas. Co. v. Simpson, 477 So. 2d 242, 249 (Miss. 1985) ("Punitive damages are not recoverable for breach of contract unless such breach is *attended by some intentional wrong, insult, abuse or gross negligence which amounts to an independent tort* . . .") (quoting Lincoln Nat'l Life Ins. Co. v. Crews, 341 So. 2d 1321, 1322 (Miss. 1977)).

[83] 38 So. 2d 94 (Miss. 1948). This case involved a landlord who allegedly cut off her tenant's electricity and requested the tenant to leave. *Simonton*, 38 So. 2d at 95.

[84] *Id.* at 96. ("We find no justification for the infliction of punitive damages on the record before us.").

C. Modern Mississippi Jurisprudence On Punitive Damages and Its Development

Mississippi caselaw concerning punitive damages now falls into two broad categories. The first category concerns tort-based injuries, such as personal injury negligence or intentional torts such as fraud. The second category regulates contract-based actions for injury, such as products liability and bad faith insurance law. Each is addressed separately below. Finally this section will address caselaw which discusses excessiveness of damages. The claim of excessiveness of punitive damages grew greater in time, leading to calls for tort reform from the 1990s to the present day.

1. Mississippi Punitive Damages Law Concerning Intentional Torts, Gross Negligence and Fraud

Today, Mississippi law is clear that a defendant who commits an intentional tort is liable for punitive damages.[85] Although an intentional act may trigger a punitive damages claim, an absence of good faith must accompany the intentional act, such as the failure to be justified in acting, even if the justification later turns out to be wrong.[86]

Two cases help to define the standards required for the imposition of punitive damages in cases of gross negligence. The first, *Doe v. Salvation Army*,[87] involved an appeal of the trial court's refusal to permit a punitive damages instruction against the employer of a camp counselor who abused four young children.[88] The Mississippi Supreme Court noted that under the punitive damages statute, the standard for imposition of punitive damages is "actual malice (or), gross negligence which evidences a willful, wanton or reckless disregard."[89] The court determined that punitive damages were not appropriate against The Salvation Army because it did not receive any benefit from the abusive acts of its employee, the counselor was not in the course and scope of his employment during the time of the abuse and The Salvation Army had no notice of the sexual proclivities of the employee in question during the period of the abuse.[90] The *Doe* decision does not give a bright line rule to determine whether a defendant's acts may support an award of punitive damages; however, a defendant who receives benefit from the practice or has notice of the act may be more susceptible to an award of punitive damages.[91]

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[85] Woodall v. Ross, 317 So. 2d 892 (Miss. 1975) (concerning application of punitive damages in tree-cutting case).

[86] *Woodall*, 317 So. 2d at 896. The *Woodall* Court noted that the defendant lacked legal justification of advice of counsel in cutting the trees down, seemed to be acting with animus toward his neighbor and "acted intentionally in a malicious and oppressive manner and not in good faith," thus justifying an award of punitive damages. *Id.*; *see also* Alpha Gulf Coast, Inc. v. Jackson, 801 So. 2d 709, 734 (Miss. 2001) (holding trial judge was correct in not submitting punitive damage instruction after considering totality of circumstances, even though tort alleged was intentional tort of false imprisonment).

[87] 835 So. 2d 76 (Miss. 2003). The trial court found that "gross negligence is

A contrasting case demonstrates the appropriate circumstances for application of punitive damages.[92] The circumstances of this case, reminiscent of the movie *Animal House*, featured an abundance of alcohol freely given out to minors in violation of university policy and a dangerous pool constructed by the fraternity into which girls were being thrown despite their resistance.[93] The jury verdict included an award of puni-

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the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another." *Doe*, 835 So. 2d at 77.

[88] *Id.* at 77. The Mississippi Supreme Court held that the trial court, in determining propriety of punitive damages, performed as the "gatekeeper" on punitive damages as the statute requires. *Id.* at 78-79.

[89] *Id.* at 81 (emphasis omitted) (quoting MISS. CODE ANN. § 11-1-65(1)(a) (2002) (Supp. 2003)). The court also noted that proof of the appropriateness of punitive damages must be made under a "clear and convincing" standard." *Id.* (quoting MISS. CODE ANN. § 11-1-65(1)(a) (2002) (Supp. 2003)).

[90] *Id.* at 81-82. Accordingly, the court found that the trial court had not abused its discretion in refusing a submission of punitive damages. *Id.* at 82.

[91] *Id.* at 82. Further, the court noted that, "[w]hat is more, the jury made no determination that TSA knew or should have known of any alleged sexual tendencies." *Id.*

[92] Beta Theta Pi Fraternity v. May, 611 So. 2d 889 (Miss. 1992). May was a "little sister" of the fraternity who was injured at one of their social events. *May*, 611 So. 2d at 891.

[93] *Id.* at 890-91. The result for May was an open, compound fracture of her

tive damages in an amount double that of the compensatory damages.[94] The Mississippi Supreme Court reviewed the award of punitive damages, and defined wilfulness and wantonness in this case, stating:

> In *Curtis v. Mississippi State Highway Commission*, this Court discussed the distinction between simple negligence and willfulness or wantonness:
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> > The fact that the damage is alleged to have been the result of the wilful acts of the Commission is a far more serious charge than simple negligence.
>
> This Court in *Raney v. Jennings*, stated:
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> > Willfulness and wantonness connote knowingly and intentionally doing a thing or wrongful act. This means actual knowledge on the part of the appellee . . . .
>
> The same theory is carried forward in *Covington v. Carley*, in which we said:
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> > Indeed, negligence and willfulness or wantonness are incompatible terms. . . . Otherwise expressed, wantonness is a failure or refusal to exercise any care, while negligence is a failure to exercise due care.[95]

The *May* Court found plenty of notice of the potentially dangerous condition created by the Beta Theta Pi fraternity, which was knowingly disregarded including: alcohol was being served despite University policy, the pool water was leaking and was dangerously low and the women were resisting being thrown into the pool.[96] Therefore, the trial court found that because the fraternity had notice of the water level, the alcohol consumption and the horseplay, yet persisted with the event, it was liable for punitive damages as a result of its wanton conduct and gross negligence.[97]

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heel; her bone was broken in several places and had pierced the skin, thus becoming exposed. *Id.* at 891. Surgery was required, and her heel became infected resulting in permanent impairment. *Id.*

[94] *Id.* at 890. The jury awarded $50,000 in compensatory damages and $100,000 in punitive damages. *Id.*

[95] *Id.* at 895 (citations omitted). These definitions distinguish between gross and mere negligence, demonstrating that lack of notice and an attempt to avoid the injury may shift the balance from gross to mere negligence. *Id.*

[96] *Id.* at 895-96. The distance from the railing to the ground was nine feet, while the water was only three and a half feet deep. *Id.*

[97] *Id.* at 896. The *May* Court noted that the fraternity's actions were "willful

Thus, notice of the potential gravity of the harm as the result of an act, knowledge that the actions involved were wrongful and the enormity of the harm suffered, are all factors to determine whether or not the conduct justifies punitive damages under a gross negligence standard.[98] In addition, a longstanding principle of Mississippi law permits the imposition of punitive damages for fraud.[99] However, gross negligence, intentional torts or fraud are not the only circumstances justifying punitive damages. Products liability and breach of contract may also generate potential punitive liability.

2. Mississippi Punitive Damages Law Concerning Products Liability and Bad Faith Insurance Practice

In the area of products liability, the recent case of *Cooper Tire & Rubber Co. v. Tuckier*[100] is instructive on the application of punitive damages. The Tuckiers' alleged that Cooper Tire used substandard, left over rubber in the construction of their tires rendering them defective and causing the treads to peel off, creating an accident.[101] The Mississippi Supreme Court applied the punitive damages statute to this incident.[102] The court found that the evidence clearly supported

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and wanton" and showed a "reckless disregard." *Id.* The *May* Court did not imply that the fraternity's grave lack of attention to these problems constituted an intentional tort but instead was a willful act done intentionally, although the intent to specifically harm may be absent. *Id.* at 895.

[98] In fact, many of these factors appear in the punitive damages statute. *See* MISS. CODE ANN. § 11-1-65(1)(e) (2002 & Supp. 2003).

[99] Cook v. Children's Med. Group, Inc., 756 So. 2d 734, 740 (Miss. 1999). "Recovery for emotional distress and mental anguish, as well as punitive damages, is allowed for fraud cases." *Cook*, 756 So. 2d at 740 (citing T.G. Blackwell Chevrolet Co. v. Eshee, 261 So. 2d 481, 485 (Miss. 1972)).

[100] 826 So. 2d 679 (Miss. 2002). In this case, a jury verdict resulted in an award of $329,000 in compensatory damages and three million dollars in punitive damages against Cooper Tire. *Cooper Tire & Rubber Co.*, 826 So. 2d at 682.

[101] *Id.* at 683-84. The Tuckiers supported their position with the testimony of an expert and two persons who worked in the plant and saw "bad stock" being used in the tires' manufacture. *Id.*

[102] *Id.* at 689-90. This use of the punitive damages statute could have been subject to debate since the product in question was purchased under a contract, thus potentially being a matter formed in contract, to which the punitive damages statute does not apply. *See* MISS. CODE ANN. § 11-1-65(1)(c) (2002 & Supp. 2003).

such a verdict, since the witness testimony demonstrated that Cooper Tire was knowingly using bad rubber stock in the manufacture of tires, which result in grave accidents.[103] The *Cooper Tire* Court found punitive damages appropriate where even one accident of such gravity occurred as the result of bad rubber, holding that the reprehensibility of the conduct involved justified punitive damages.[104]

Many current punitive damage contract cases in Mississippi involve insurance companies and allegations of bad faith. Punitive damages in contract-based actions historically require a breach of contract plus a wrong amounting to an intentional (not merely a gross-negligence based) tort.[105] The Mississippi Supreme Court has held that such proof requires a heavy burden of persuasion.[106] Further, the court has noted that at the end of trial, the court should first determine whether there was an arguable reason for the insurance company to justify its conduct, and if so, the court should not permit the jury to consider punitive damages.[107]

However, recent Mississippi jurisprudence has made it easier to sustain punitive damage awards against insurers. For example, today, a verdict may be rendered against an insurer even with the presence of an arguable reason to deny a claim, if the insurer breached its contract with an insured in a manner that creates an independent tort.[108] The Mississippi Supreme Court set forth the procedure for determining the application of punitive damages in bad faith cases in the era when the presence of an arguable reason did not by itself conclude the issue as to punitive damages:

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[103] *Cooper Tire & Rubber Co.*, 826 So. 2d at 690. The Court found the workers' testimony was evidence of the knowledge requirement of the punitive damages statute since the testimony provided proof that Cooper Tire was using bad rubber stock in its tires. *Id.*

[104] *Id.* at 690. Ratios, such as one tire breaking out of 66,000, did not impress the Court where the damages from the one accident resulted in death. *Id.*

[105] Lincoln Nat'l Life Ins. Co. v. Crews, 341 So. 2d 1321, 1322 (Miss. 1977). "Punitive damages are not recoverable for breach of contract unless such breach is attended by some intentional wrong, insult, abuse or gross negligence which amounts to an independent tort." *Lincoln Nat'l Life Ins. Co.*, 341 So. 2d at 1322 (citing Progressive Cas. Co. v. Keys, 317 So. 2d 396 (Miss. 1975); D. L. Fair Lumber Co. v. Weems, 16 So. 2d 770 (Miss. 1944); American Ry. Express Co. v. Bailey, 107 So. 761 (Miss. 1926); Hood v. Moffett, 69 So. 664 (Miss. 1915)).

[106] Blue Cross & Blue Shield, Inc. v. Campbell, 466 So. 2d 833, 842 (Miss. 1985). "Any plaintiff asking for punitive damages, or any special or extraordinary damages based upon 'bad faith' of an insurance company has a heavy burden." *Campbell*, 466 So. 2d at 842.

[107] *Id.* The "reasonably arguable" basis could be in fact or in law. *Id.*

[108] Lewis v. Equity Life Nat'l Ins. Co., 637 So. 2d 183, 185 (Miss. 1994). "Mis-

> Initially, the trial court should examine whether as a matter of law the insurer has a legitimate or arguable reason to deny the claim. Should the court find that there is a legitimate or arguable reason for the denial, a punitive damage instruction should not be given; if however, reasonable minds could differ as to whether there is a legitimate or arguable reason, the court must next consider whether there is evidence of gross negligence or intentional misconduct in the denial of the claim. If there is sufficient evidence to indicate that the insurer acted intentionally or was grossly negligent, a punitive damage instruction should be granted.[109]

Further, under contract-based punitive damages, a jury may award such damages under a "preponderance of the evidence" standard.[110] However, the Mississippi Supreme Court then added a protection for the application of punitive damages, stating that:

> It can be argued with considerable persuasion that unless the trial judge grants a directed verdict to the insured plaintiff on

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sissippi law has evolved to a point of recognition that submission of the punitive-damages issue may be submitted—notwithstanding the presence of an arguable basis." *Lewis*, 637 So. 2d at 185 (citations omitted).

[109] *Id.* at 185-86 (quoting Merchants Nat'l Bank v. Southeastern Fire Ins. Co., 751 F.2d 771, 775 (1985)) (footnotes and citations omitted from original). *Merchants* followed the Mississippi Supreme Court's instructions on how to determine the applicability of punitive damages in *Reserve Life Insurance v. McGee*, 444 So. 2d 803, 809-10 (Miss. 1983). *Id.* at 185.

[110] Blue Cross & Blue Shield, Inc. v. Maas, 516 So. 2d 495, 498 (Miss. 1987). Although the court stated that the jury instruction with that standard was in accordance with Mississippi law, the court failed to state what specific law permitted the lower standard to be used. *Maas*, 516 So. 2d at 498. This lower standard raises both due process and equal protection concerns since, particularly under equal protection, no court has ever applied a rational basis standard to the exclusion of contracts and asbestos-related cases from the protections of the punitive damages statute, which itself requires proof of punitive damages with a clear and convincing standard. *See Bankers Life & Cas. Co.*, 486 U.S. at 80-85 (discussing rational basis standard).

> the contract claim, then, as a matter of law, the insurance carrier has shown reasonably arguable basis to deny the claim; and, therefore, the carrier should never be subjected to the possibility of punitive damages based upon "bad faith". There is compelling logic behind this argument and this would certainly appear to be true in the vast majority of cases. This criterion should ordinarily determine the answer to the question.[111]

The Mississippi Supreme Court has noted that "clerical errors and other honest mistakes" do not justify punitive damages.[112]

The best case for demonstrating the current state of Mississippi punitive damages law relating to bad faith cases may be *State Farm Mutual Automobile Insurance Company v. Grimes*.[113] In this theft claim for which State Farm rejected payment, the Mississippi Supreme Court announced yet another standard for the imposition of punitive damages in bad faith cases, holding:

> The issue of punitive damages should not be submitted to the jury unless the trial court determines that there are jury issues with regard to whether:
> 1. The insurer lacked an arguable or legitimate basis for denying the claim, *and*
> 2. The insurer committed a wilful or malicious wrong, or acted with gross and reckless disregard for the insured's rights.[114]

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[111] *State Farm Fire & Cas. Co.*, 477 So. 2d at 252 (citations omitted). Since *Simpson* has never been overruled, the issue of how to harmonize the two procedures for determining punitive damages is still open to debate.

[112] *Maas*, 516 So. 2d at 497. The *Mass* court noted that a denial of a claim after the insurer's own investigation indicates that the insurer should have paid the claim is not "clerical error." *Id.* at 497-98.

[113] 722 So. 2d 637 (Miss. 1998). This case involved an alleged wrongful denial to pay on a comprehensive claim where theft and vandalism was involved. *Grimes*, 722 So. 2d at 639.

[114] *Id.* at 641 (emphasis in original) (citations omitted). By doing so, the Mississippi Supreme Court reintroduced the requirement of arguable reason plus conduct amounting to an independent tort, as opposed to the presence of either qualifying the case for punitive damages.

The *Grimes* Court, however, found that the evidence supporting a claim of intentional destruction of the vehicle by the insured was circumstantial, including the presence of evidence indicating an intentional stripping down of the vehicle and other evidence indicating the insured was tired of the car itself.[115] The *Grimes* Court essentially concluded, however, that in the absence of direct evidence, State Farm's denial could justify an award of punitive damages, stating:

> Although the present issue is a very close one, this Court concludes that a jury could have validly found that State Farm lacked an arguable basis for denying the claim. State Farm's case is based largely on innuendo and testimony that the crime was atypical of auto thefts in this State. *Most conspicuous in its absence is any direct evidence whatsoever that Grimes committed the fraud, such as testimony by witnesses who saw Grimes stripping the Corvette or to whom Grimes admitted to having committed the fraud.* The thief left the stripped car outside an apartment complex on the night of the theft, but State Farm introduced no testimony that Grimes was spotted outside the complex on the night of the crime. State Farm submits that the "word on the street" indicated that "this was an inside job and that the parts were at Joe's Garage." However, State Farm did not introduce any testimony from employees or customers of Joe's Garage indicating that Grimes had taken the parts to the garage.[116]

In taking this position, the *Grimes* Court reversed itself, holding that this case was not one in which *Universal Insur-*

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[115] *Id.* The court found the evidence of damage unrelated to a car theft to be the most persuasive evidence State Farm had. *Id.*

[116] *Id.* at 642 (emphasis added). The court reaffirms this point, stating that,

> [A] jury could have validly concluded that, absent some direct evidence that Grimes had committed the fraud in question, a denial of the claim was not sufficiently supported by credible evidence as to lead a reasonable insurer to deny the claim. This court thus affirms the jury's finding that the claim was denied without arguable basis.

Id. Thus with one opinion, the court made it clear that if an insurance company lacks an eyewitness or an admission of insurance fraud, the insurer must pay or risk punitive damages. *Id.*

ance Company v. Veasley supra-compensatory damages would be appropriate.[117] A *Grimes* dissent considered whether the award of punitive damages was excessive to the compensatory damages at stake in the case.[118]

3. Mississippi Jurisprudence on the Excessiveness of Punitive Damages

The first case in Mississippi in which the plaintiff asserted his damages were worth one million dollars was in 1884.[119] Despite the loss of both his legs, the plaintiff recovered absolutely nothing.[120] It took almost another century before a jury awarded over a million dollars.[121] Once Mississippi jurisprudence broke the one million dollar award barrier, it lost no time in vastly exceeding that amount with verdicts.[122]

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[117] *Id.* "Nor is it a case in which the claim was denied because of some clerical error or other inadvertence for which the imposition of punitive damages would simply be unfair." *Id.* (citations omitted). The dissent noted that *Universal Life Ins. Co. v. Veasley* provided recovery against an insurer who makes a mistake but in not such a manner as to justify a full bad faith award. *Id.* at 646 (C.J., Prather, dissenting) ("A clearer definition of 'arguable basis' is particularly important in light of the recently created right of an insured to receive 'actual damages' such as attorneys fees and court costs in cases in which a claim is denied or delayed without an arguable basis, but where the insurer did not act with the requisite level of bad faith to make appropriate the awarding of punitive damages."). The original opinion issued by the Mississippi Supreme Court in *Grimes*, 1997 Miss. LEXIS 676 (Miss. 1997), which held that the claim denial justified supra-compensatory but not bad faith punitive damages, was later withdrawn by the court and replaced by the second *Grimes* opinion discussed above.

[118] *Id.* at 647 (Waller, J., dissenting in part). Justice Waller found that the punitive award of $1,250,000 as opposed to the compensatory damages amount of $1900 left a ratio of 658 to 1, which was excessive. *Id.* (Waller, J., dissenting in part).

[119] Dowell v. Vicksburg & Meridian R.R., 61 Miss. 519, 521 (1884). The accident occurred when the railway worker was running to catch a moving freight train, slipped on a broken step and fell beneath the railroad car, where a wheel crushed his legs below the knee. *Dowell*, 61 Miss. at 522. Workers' compensation was not a part of Mississippi law for another sixty-four years. *See* MISS. CODE ANN. § 71-3-1 (2000).

[120] *Dowell*, 61 Miss. at 531-32. The *Dowell* Court held that since the injured worker himself was reckless, he was barred from recovery, notwithstanding the negligence of other railway workers on the line. *Id.*

[121] Stubblefield v. Jesco, Inc., 464 So. 2d 47, 60 (Miss. 1985). The jury actually rendered the verdict in 1981. *Stubblefield*, 464 So. 2d at 60. In the first *Stubblefield*, the court recounted the horrendous burn injuries inflicted on Stubblefield, resulting in burns over sixty percent of his body and a three-hundred day hospital stay. *Id.* at 50-51.

Mississippi Supreme Court opinions have struggled to define an excessive ratio between punitive and compensatory damages. The Mississippi courts have cited United States Supreme Court precedent in holding that no "bright line" rule on excessiveness exists.[123] On the other hand, our courts have looked at ratios to determine the excessiveness of awards and made some points of comparison. The *MIC Life* Court noted:

> In *Independent Life & Acc. Ins. Co. v. Peavy*, this Court upheld a punitive damages award approximately 600 times that of the compensatory damages. This is the highest ratio sanctioned by this Court.[124]

Other mathematical formulae used to determine the reasonableness of punitive damages include percentage of net worth.[125] However, the general standard to overcome in a presumption of correctness in such a punitive damages verdict is extremely high, and it requires a verdict that "shocks the conscience."[126]

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[122] MIC Life Ins. Co. v. Hicks, 825 So. 2d 616, 618 (Miss. 2002). Although reduced by remittitur, the jury initially awarded thirty-six million dollars against two companies on damages which were purely economic. *MIC Life Ins. Co.*, 825 So. 2d at 619-20.

[123] *Id.* at 623 (citing BMW of North America v. Gore, 517 U.S. 559, 582-83 (1996)). The *Hicks* court applied *Gore* factors to find the verdict in this case excessive, stating:

> The constitutional question presented is whether MIC Life had fair notice that it could be punished $1 million for failing to pay a refund of $637.99 to Mrs. Hicks, not some potential, hypothetical aggregate of harm to persons not before this Court and against whom no harm has been proven. We find that MIC Life did not have fair notice of such a punishment. A correct analysis of the *Gore* factors reveals that the punitive damages award in this case is unconstitutionally excessive.

Id.

[124] Id. at 623 (citations omitted). The *Hicks* court also noted its rejection of a punitive to compensatory damages award ratio of 1875 to 1 in *Dixie Ins. Co. v. Mooneyhan*. *Id.* at 623 (citations omitted).

[125] Cooper Tire & Rubber Co. v. Tuckier, 826 So. 2d 679, 691 (Miss. 2002). Although *Cooper Tire & Rubber Co.* stated that, "[a] simple mathematical formula cannot be used to determine whether this punitive damage award is excessive or constitutional," such formulae have been used to determine the fairness of the award in light of constitutional principles. *Id.* (citing Valley Forge Ins. Co. v. Strickland, 620 So. 2d 535, 541 (Miss. 1993) (allowing 1.5% of net worth as acceptable punitive damages award); Andrew Jackson Ins. Co. v. Williams, 566 So. 2d 1172, 1191 (Miss. 1990) (allowing 5.25% of net worth as acceptable punitive

D. What "Tort Reform" Has Wrought: A Comparative Study of Mississippi's Punitive Damage Statute with Sister State Statutes

Because of such high verdicts, numerous complaints began to arise in both the legal and political forum in Mississippi concerning the effect on business and general development within the state. This discussion provoked efforts at tort reform.

In 1993, and again in 2002, the Mississippi legislature responded to mounting demands for tort reform by enacting and expanding curbs on the award of punitive damages.[127] In 1993, the Mississippi legislature began its experiment in tort reform by first requiring justification for the award of punitive damages by "clear and convincing evidence."[128] Plaintiffs must further prove by clear and convincing evidence that the defendant acted with "actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud."[129]

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damages award).

[126] *Valley Forge Ins. Co.*, 620 So. 2d at 541 (holding specifically that award must be so great as to demonstrate "passion, bias and prejudice on the part of the jury so as to shock the conscience of the court").

[127] MISS. CODE ANN. § 11-1-65 (2002 & Supp. 2003) (historical note). Interestingly considering the public debate, there was no enabling purpose listed in the statute, as one sees in other statutes. *See* MISS. CODE ANN. § 13-3-31 (2002) (editor's note) (listing reason for publications definition statute qualifying newspapers to publish legal notices as "it is in the public interest of the people of this state to assure that legal notices required by law to be published in a newspaper in this state are published in newspapers having numerically substantial, extensive and widespread circulation to bona fide paying subscribers . . . ."). Presumably, it was difficult enough to get sufficient legislative agreement to enact the revisions in the first place.

[128] MISS. CODE ANN. § 11-1-65(1)(a) (2002 & Supp. 2003). This standard of proof tracked what had long been the standard of proof for imposition of punitive damages in cases involving "fraud, dishonesty and bad motive," and the court had held that "efforts to overcome this presumption must be more than a mere preponderance; it must be clear and convincing." Brewster v. Bubba Oustalet, Inc., 231 So. 2d 189, 189 (Miss. 1970).

[129] MISS. CODE ANN. § 11-1-65(1)(a) (2002 & Supp. 2003). This language was a

The legislature enacted a requirement that punitive damages could not be decided at the same time of trial as compensatory damages but instead must be bifurcated at trial.[130] The legislature then listed the factors to consider in an award of punitive damages, such as:

(1) the defendant's financial condition and net worth;[131]
(2) the nature and reprehensibility of the defendant's wrongdoing, for example, the impact of the defendant's conduct on the plaintiff, or the relationship of harm being caused and the defendant's motivation in causing such harm;[132]
(3) the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct;[133]
(4) other circumstances shown by the evidence.[134]

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codification of prior Mississippi caselaw from various areas. *See* Whitten v. Commercial Dispatch Publ'g Co., 487 So. 2d 843, 844 (Miss. 1986)(regarding defamation, "actual malice, defined as ill will or reckless disregard of the falsity of the statements made"); *State Farm Fire & Cas. Co.*, 477 So. 2d 242 (distinguishing between "gross negligence" or "willful and intentional wrong," either of which if proven would justify punitive damages).

[130] MISS. CODE ANN. § 11-1-65(1)(c) (2002 & Supp. 2003). This bifurcation has precedent in Mississippi law, particularly with bad faith insurance actions. *See* Nationwide Mut. Ins. Co. v. Evans, 553 So. 2d 1117, 1119 (Miss. 1989) (stating that actual and punitive damages were bifurcated at trial); *see also* Cooper v. State Farm Fire & Cas. Co., 568 So. 2d 687, 697 (Miss. 1990) (Robertson, J., dissenting,) (listing other cases and authority for bifurcation in such cases).

[131] MISS. CODE ANN. § 11-1-65(1)(e) (2002 & Supp. 2003). Examination of net worth has long been a factor for imposition of punitive damages in Mississippi. *See Bell*, 27 Miss. at 86.

[132] MISS. CODE ANN. § 11-1-65(1)(e) (2002 & Supp. 2003). These concerns also had their genesis in Mississippi caselaw. *See* Fowler Butane Gas Co. v. Varner, 141 So. 2d 226, 234-35 (1962) (discussing propriety of awarding punitive damages in light of severe injuries to plaintiff, including "excruciating and prolonged pain").

[133] MISS. CODE ANN. § 11-1-65(1)(e) (2002 & Supp. 2003). Duration of misconduct was used as a factor in determining whether punitive damages were appropriate for some time. *See* Town of Newton v. Wilson, 91 So. 419, 419 (Miss. 1922) (noting fact that town cut off water without cause for several days as reason for punitive damage assessment against town at trial level, though Mississippi Supreme Court disallowed punitive damages against municipality as contrary to law). As for concealment, that principle also had its genesis in Mississippi law concerning fraud and concealment. *See* Gardner v. Jones, 464 So. 2d 1144, 1149 n.4 (Miss. 1985) (discussing appropriateness of punitive damages in fraud and concealment cases).

[134] MISS. CODE ANN. § 11-1-65(1)(e) (2002 & Supp. 2003). For example, a

The Mississippi legislature also enacted the following factors to be used by a trial court "in determining whether the (jury) award is excessive":

> (1) Whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred;
> (2) The degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;
> (3 The financial condition and net worth of the defendant; and
> (4) In mitigation, the imposition of criminal sanctions on the defendant for its conduct and the existence of other civil awards against the defendant for its same conduct.[135]

In addition, the trial court's duty is to ensure that the "award is reasonable" and "rationally related to the purpose to punish what occurred" and to "deter its repetition by the defendant and others."[136] However, the Mississippi legislature left key areas of law from protection under this statute, such as "causes of action for persons and property arising out of asbestos" and contracts.[137] Further, the Mississippi legislature enacted protections for store owners selling potentially defective

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defendant's drunkenness has always been an element in "aggravation of the tort." Reese v. Barbee, 61 Miss. 181, 184 (1883).

[135] MISS. CODE ANN. § 11-1-65(1)(f)(ii) (2002 & Supp. 2003). These factors, save the clause regarding the existence of prior exemplary awards as mitigation against further punitive awards, are factors for jury consideration.

[136] *Id.* § 11-1-65(1)(f)(i). The twin purposes of punishment and deterrence have long been the rationale for the application of punitive damages. C & C Trucking Co. v. Smith, 612 So. 2d 1092 (Miss. 1992). "In most jurisdictions, the court will award punitive damages because of the positive public policy to punish the defendant and to serve as a warning or example to others who may commit similar outrageous acts in the future." *C&C Trucking*, 612 So. 2d at 1107 (quoting REDDEN, PUNITIVE DAMAGES, § 2.1(c) (2d ed. 1989)).

[137] MISS. CODE ANN. § 11-1-65(5) (a)-(c) (2002 & Supp. 2003). The Mississippi Supreme Court has noted this exception and expanded it to include torts which arise out of certain contractual obligations, such as bad faith insurance practice. Am. Funeral Assur. Co. v. Hubbs, 700 So. 2d 283, 286 (Miss. 1997).

products, protecting them when they did not utilize some control over whatever aspect of the product caused injury.[138]

The Mississippi Code's punitive damages provisions, as enacted in 1993, stood without revision for approximately ten years. The Mississippi Supreme Court recognized its existence and its purpose in regulating the award of punitive damages, stating:

> The punitive damages statute requires a relation between the wrongful act and the harm that resulted. For instance, among the factors to be considered in the award of punitive damages is the "impact of the defendant's conduct on the plaintiff." In addition, once the punitive damage verdict has been awarded, the trial court is required to determine "[w]hether there is a reasonable relationship between the punitive damage award and the harm likely to have resulted from the defendant's conduct as well as the harm that actually occurred." Thus, the statute is clear that there must be some relation between the wrongful act and the harm that resulted.[139]

However, beginning in the mid-1990s many commentators sounded warning alarms about the liberality with which courts were permitting punitive damages awards, and the size of such awards, because of the loose language of punitive damage statutes and caselaw.[140] For example, former Mississippi Supreme Court Justice Reuben V. Anderson noted:

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[138] MISS. CODE ANN. 11-1-65(2) (2002 & Supp. 2003).

> The seller of a product other than the manufacturer shall not be liable for punitive damages unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller had actual knowledge of the defective condition of the product at the time he supplied same; or the seller made an express factual representation about the aspect of the product which caused the harm for which recovery of damages is sought.

Id.

[139] Choctaw Maid Farms, Inc. v. Hailey, 822 So. 2d 911, 924 (Miss. 2002) (citations omitted). Even in 2002, contrary to perception, the Mississippi Supreme Court stated, "such damages are to be awarded only in extreme cases." *Choctaw Maid Farms, Inc.*, 822 So. 2d at 923.

[140] Reuben V. Anderson, *Litigation in Mississippi Today: A Symposium: Why*

> Nowhere is this need more apparent than in the area of punitive damages. Because of Mississippi's loose standards for determining the amount of punitive damages, Mississippi punitive damages doctrines have bankrupted one national corporation, almost caused the bankruptcy of another and, today, threaten to bankrupt many more. The punitive damages awards are unpredictable and grossly out of proportion to the offenses they have caused. Punitive damage awards have caused great concern in the American corporate community. In fact, within the past year, our firm has been called on to give advice to one of the largest finance companies and one of the largest insurers in the United States, who asked whether they should attempt to withdraw from Mississippi entirely. We have no reason to believe that these inquiries are anything other than dead serious.[141]

In fact, these statements were only a part of the firestorm of demand, first from medical professionals and then from general business interests, for some sort of reform in the area of punitive damages.

For example, medical professional groups, such as the American Medical Association, listed Mississippi as one of seventeen crisis states.[142] Mississippi physicians asserted that the unfavorable legal climate catastrophically affected their

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Mississippi Needs to Pay Attention to National Trends on Punitive Damages, 71 MISS. L.J. 579, 579 (2002). Anderson noted generally that because companies evaluate the legal climate of a state before they invest there, "it is essential that Mississippi keep up with legal trends around the country and try not to get too far out of step." Anderson, 71 MISS. L.J., at 579.

[141] *Id.* Justice Anderson noted that the Mississippi Supreme Court's affirmance of extreme punitive damages awards, by virtue of the ratio between compensatory and punitive damages, placed Mississippi out of the mainstream of American jurisprudence. *Id.* at 581-82.

[142] *Professional Issues: 18 States Now in Deep Liability Crisis*, AMNEWS (Am. Med. Ass'n), Mar. 17, 2003. Arkansas and Texas were also in crisis, according to the American Medical Association, while Alabama and Tennessee were manifesting "problem signs," and Louisiana was "currently OK." *Id.*

premiums and their access to malpractice coverage, which was inducing doctors to leave the state.[143] Further, such lawsuits were engendering unfair legal results, such as the case of pharmacist Traci Swilley of Fayette, Mississippi's only pharmacy, who was sued numerous times apparently to gain jurisdiction in Jefferson County, which is thought to be a favorable venue for plaintiff's verdicts.[144]

As a result of significant political pressure, the Mississippi legislature granted doctors many tort reform provisions. Business interests also pushed an agenda of tort reform, resulting in changes to the general body of punitive damages.[145] The statutory changes were based on another state's law,[146] and affected punitive damages, as well as other areas of civil trial practice such as venue selection and joint and several liability.[147]

The primary change was the inclusion of a statutory cap on punitive damages:

> In any civil action where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed the following:

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[143] Tanya Albert, *Miss. Doctors Hope Tort Reform Brings Rate Relief—Eventually*, AMNEWS (Am. Med. Ass'n), Oct. 28, 2002. Mississippi professional groups looked to tort reform as an eventual means of regaining access to affordable malpractice coverage. *Id.* ("The immediate impact of the law will be marginal," said MSMA Past President Hugh Gamble, MD, a thoracic surgeon in Greenville. "Mississippi's problem is that most of the insurance carriers left. They won't come back until the law stands judicial muster.").

[144] Sherman Joyce & Michael Hotra, *Litigation in Mississippi Today: a Symposium: Mississippi's Civil Justice System: Problems, Opportunities, and Some Suggested Repairs*, 71 MISS. L.J. 395, 397 (2002). To be fair, it should be noted that both authors are advocates for tort reform in general; Joyce is President of the American Tort Reform Association, and Hotra is as a Republican staffer involved with products liability law. *Id.* at 395.

[145] Patrice Sawyer, *Gov. Signs Tort Reform Bill*, CLARION-LEDGER, (Dec. 4, 2002), *available at* http://www.clarionledger.com/news/0212/04/m02.html. As the article notes, "[b]oth the business and medical communities have said they needed relief from high jury awards." *Id.*

[146] *Id.* The legislature looked to Missouri for much of the tort reform enacted in 2003. *Id.*

[147] *Id.* As the article notes, the general tort reform "also restricts where lawsuits can be filed and changes how multiple defendants can be held financially liable." *Id.*

> (i) Twenty Million Dollars ($20,000,000.00) for a defendant with a net worth of more than One Billion Dollars ($1,000,000,000.00);
>
> (ii) Fifteen Million Dollars ($15,000,000.00) for a defendant with a net worth of more than Seven Hundred Fifty Million Dollars ($750,000,000.00) but not more than One Billion Dollars ($1,000,000,000.00);
>
> (iii) Ten Million Dollars ($10,000,000.00) for a defendant with a net worth of more than Five Hundred Million Dollars ($500,000,000.00) but not more than Seven Hundred Fifty Million Dollars ($750,000,000.00);
>
> (iv) Seven Million Five Hundred Thousand Dollars ($7,500,000.00) for a defendant with a net worth of more than One Hundred Million Dollars ($100,000,000.00) but not more than Five Hundred Million Dollars ($500,000,000.00);
>
> (v) Five Million Dollars ($5,000,000.00) for a defendant with a net worth of more than Fifty Million Dollars ($50,000,000.00) but not more than One Hundred Million Dollars ($100,000,000.00); or
>
> (vi) Four percent (4%) of the defendant's net worth for a defendant with a net worth of Fifty Million Dollars ($50,000,000.00) or less.[148]

The Mississippi Legislature also enacted certain procedures for the utilization of these statutory caps in civil practice.[149] The trial court is required to utilize these caps, without informing the jury of the caps.[150] In addition, there were exceptions to the statutory caps, permitting unlimited discretion to the jury in certain situations, such as a civil action based upon a felony[151] or an accident due to alcohol or drug abuse.[152] However, the legislature protected companies from punitive damage exposure from the torts of their employees, stating: "[t]he exceptions provided in paragraph (d) shall not apply to an employer of a person acting outside the scope of such person's employment or responsibility as an agent or employee."[153]

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[148] MISS. CODE ANN. § 11-1-65(3) (2002 & Supp. 2003). As a contemporary article noted, the statutory cap could be summarized as "a four percent cap on punitive damages for the net worth of businesses valued below $50 million; for larger companies, damages are capped at $20 million." *AIA Applauds Passage of Miss. Tort Reform Measure*, INSURANCE JOURNAL (Nov. 27, 2002) *available at* http://www.insurancejournal.com/news/newswire/southeast/2002/11/27/24629.htm. For anyone who believes that this statutory change ended lobbying for tort reform, Cecil Pearce, American Insurance Association vice-president stated, "while this legislation does not include everything that we wanted, such as limits on non-economic damages, it's a good start." *Id.*

[149] MISS. CODE ANN. § 11-1-65(3)(b) (2002 & Supp. 2003) ("For the purposes of determining the defendant's net worth in paragraph (a), the amount of the net worth shall be determined in accordance with Generally Accepted Accounting Principles."). The Mississippi Supreme Court apparently requires this proof to be made by the plaintiff in his or her punitive damages case. Cooper Tire & Rubber Co. v. Tuckier, 826 So. 2d 679, 690 (Miss. 2002).

At this point, it is too soon to note how the Mississippi Supreme Court will construe the changes made in 2002.[154] However, a cursory comparison of Mississippi's punitive damage statutes with statutes of other states reveals very little difference:

Alabama—In order for an award of punitive damages to stand in Alabama, there must be proof meeting a clear and convincing standard that "the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff."[155] Alabama also has a complicated statutory cap system, which generally limits awards to three times compensatory damages or $500,000, whichever is greater; however if the defendant is a small business, the award must be reduced to $50,000 or "ten percent of the company's net worth, whichever is greater."[156] Intentionally inflicted torts are excepted from this cap.[157]

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[150] MISS. CODE ANN. § 11-1-65(3)(c) (2002 & Supp. 2003) ("The limitation on the amount of punitive damages imposed by this subsection (3) shall not be disclosed to the trier of fact, but shall be applied by the court to any punitive damages verdict.").

[151] *Id.* § 11-1-65(3)(d)(i) (listing one exception as "[i]f the defendant was convicted of a felony under the laws of this state or under federal law which caused the damages or injury"). There is precedent for such actions in Mississippi case law. Jordan v. McKenna, 573 So. 2d 1371, 1375-76 (Miss. 1990) (finding that criminal conviction of felony rape precluded issue of liability in subsequent civil trial, stating, "[w]hen we hold Jordan's rape conviction, once final, established his fault in tort, we do nothing more than restate our traditional view of conduct actionable per se.").

[152] MISS. CODE ANN. § 11-1-65(3)(d)(ii) (2002 & Supp. 2003) ("[w]hile the defendant was under the influence of alcohol or under the influence of drugs other than lawfully prescribed drugs administered in accordance with a prescription").

[153] *Id.* § 11-1-65(3)(e). This protection is important, and the Mississippi Supreme Court clarified when the exception to *respondeat superior* applies. Adams v. Cinemark USA Inc., 831 So. 2d 1156, 1159-60 (Miss. 2002) (affirming that "a master will not be held liable if the employee 'had abandoned his employment and was about some purpose of his own not incidental to the employment,'" and further finding that although unauthorized acts may nevertheless be incidental to one's employment, assaulting movie customer did not so qualify because Cinemark had not authorized employee to leave box office, which she did in order to beat up customer, and where employee's assault was result of "anger, not because she was concerned about protecting Cinemark's property or increasing Cinemark's profit") (quoting Odier v. Sumrall, 353 So. 2d 1370, 1372 (Miss. 1978)).

[154] MISS. CODE ANN. § 11-1-65 (2002 & Supp. 2003) (noting that changes went into effect January 1, 2003).

Arkansas—Arkansas, in addition to a general punitive damages statute,[158] provides specific protections from punitive damages in certain circumstances such as loan transactions.[159] Due to the push for tort reform discussed above,[160] the Arkansas legislature revised several laws relating to punitive damages, including increasing the standard of proof[161] and limiting punitive damages to occasions where the defendant acted intentionally to hurt another or was liable beyond gross negligence.[162] Arkansas also employs statutory caps on punitive damages.[163]

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[155] ALA. CODE § 6-11-20(a) (1993). In Alabama, malice is described as having an intent to injure a person or property, or having an evil intent. *Id.* § 6-11-20(b)(2). Wantonness is defined as "conduct which is carried on with a reckless or conscious disregard of the rights or safety of others." *Id.* § 6-11-20(b)(3).

[156] *Id.* § 6-11-21(a) and (b). Under Alabama law, a small business is defined as a business with a net worth less than $2,000,000. *Id.* § 6-11-21(c). However, where personal injury resulted from the tort, an award of three times compensatory damages, or $1,500,000, whichever is greater, is permissible regardless of the net worth of the defendant. *Id.* § 6-11-21(d).

[157] *Id.* § 6-11-21(j). Also, as in Mississippi, trial courts are not to inform juries about the statutory caps; instead, the courts are to apply them post-verdict. *Id.* § 6-11-21(g); *see supra* note 150.

[158] *See* ARK. CODE ANN. § 16-55-206 and 16-55-207 (Supp. 2003).

[159] *Id.* § 16-64-130. In Arkansas, financial institutions are immune from punitive damages arising from loans unless the circumstances surrounding the loan involve personal injury or physical damage. § 16-64-130

[160] Morrison, *supra* note 6 and accompanying text.

[161] ARK. CODE ANN. § 16-55-207 (Supp. 2003) (establishing a clear and convincing evidence burden of proof for applicability of punitive damages).

[162] *Id.* § 16-55-206 (permitting punitive damages only when "his or her conduct would naturally and probably result in injury or damage and that he or she continued the conduct with malice or in reckless disregard of the consequences from which malice may be inferred"). Compensatory damages must be awarded as a prerequisite to punitive damages. *Id.*

Florida—Florida has punitive damages statutes dealing with specific circumstances, such as alcohol abuse.[164] Florida's general punitive damages statute requires that the plaintiff prove the defendant was liable for either intentional misconduct or gross negligence to a clear and convincing standard.[165] The Florida statute has a graduated cap on punitive damages, the first tier being gross negligence, the second tier being unreasonable conduct motivated only by financial gain where the conduct was known to carry a "high likelihood of injury resulting from the conduct" and the third tier being intentional torts.[166]

Georgia—Georgia enacted a punitive damages law that also requires a standard of proof of the applicability of punitive damages at a clear and convincing level.[167] Georgia, as Mississippi, employs a bifurcated trial system for determining first compensatory and then punitive damages.[168] There is no punitive damages cap for products liability, but a portion of the punitive damages verdict goes to the State of Georgia.[169] Although actions taken under the influence of drugs or alcohol, or intentional torts, have no limit on the award of punitive damages, all other actions have a $250,000 statutory cap.[170] However, Georgia has an absolute prohibition on punitive damages arising from contract-based causes of action.[171]

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[163] *Id.* § 16-55-208. Under the Arkansas plan, punitive damages are limited to the greater of either $250,000, or three times the compensatory damages, not to exceed $1,000,000. *Id.* § 16-55-208(a). However, this cap will not apply to intentional torts. *Id.* § 16-55-208(b).

[164] FLA. STAT. ANN. § 768.736 (1997 & Supp. 2003) (exempting statutory punitive damage protections from causes of action involving alcohol where level of blood intoxication exceeded 0.08 percent or influence of alcohol and drugs impaired defendant's normal facilities).

[165] *Id.* § 768.72(2). Florida law defines intentional misconduct as "actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage," and gross negligence as "the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct." *Id.*

[166] *Id.* § 768.73. In these cases, punitive damages for mere gross negligence caps at three times compensatory damages or $500,000, whichever is lesser; punitive damages for unreasonable conduct motivated only for financial gain where the actor knew the conduct involved a "high likelihood of injury" caps at four times compensatory damages or $2,000,000, whichever is lesser; punitive damages for intentional torts have no cap. *Id.*

[167] GA. CODE ANN. § 51-12-5.1 (2000). As stated in many other punitive damages statutes, including Mississippi's, only "willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences" will suffice to permit an award of punitive damages. *Id.*

[168] *Id.* § 51-12-5.1(d). The jury must determine in the first phase of trial

Louisiana—Although Louisiana judicially abrogated punitive damages decades ago,[172] there are several exceptions to that general rule, such as the defendant's involvement in an alcohol-related accident.[173] In addition, supra-compensatory damages may be awarded in cases of bad faith insurance practice such as failure to pay a claim promptly.[174]

Tennessee—According to local legal observers, there is "[n]o tort reform legislation in effect in Tennessee."[175] However, the Tennessee Supreme Court has judicially set forth much the same punitive damages principles as codified by other Southern legislatures.[176] The standard of proof for recovery is clear and

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whether punitive damages are warranted, by jury verdict; only then does the punitive damages trial commence. *Id.*

[169] *Id.* § 51-12-5.1(e). That proportion is rather steep, being seventy-five percent of the punitive damages recovery, less a deduction for costs of recovery. *Id.* § 51-12-5.1(e)(2). Only one cause of action for the product is permitted in Georgia to result in punitive damages, regardless how many pending suits involve that product. *Id.* § 51-12-51(e)(1).

[170] *Id.* § 51-12-5.1(f) and (g). This provision limits the exposure to such punitive damages to the one who is actively negligent, as opposed to the employer of such an actor. *Id.* § 51-12-51(f).

[171] *Id.* § 13-6-10 ("Unless otherwise provided by law, exemplary damages shall never be allowed in cases arising on contracts."). This prohibition dates back to the time of the Civil War. *Id.* § 13-6-10 (dating statute originally back to 1863).

[172] *See* McCoy v. Arkansas Natural Gas Co., 143 So. 2d 383, 385 (La. 1932).

[173] LA. CIV. CODE. ANN. art. 2315.4 (1997) ("Exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries.").

[174] LA. REV. STAT. ANN. § 22:1220(B) (1995 & Supp. 2003). In such cases, an award may be granted of "penalties assessed against the insurer in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater." *Id.* § 22:1220(C).

[175] Robert D. Flynn, *Overview of Tennessee Law*, (Sept. 17, 2003), *available at* http://www.sfrlaw.com/tnlawoverview.htm.

[176] Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992) ("In Tennes-

convincing.[177] Further, the factors to be considered in determining the amount of punitive damages are identical to those of Mississippi's own punitive damages statute.[178] Thus, Tennessee has judicially enacted its own punitive damages statute.

Texas—Texas, like most other Southern states surveyed, requires proof of punitive damages at a clear and convincing level, and the conduct must be, "fraud; malice; or wilful act or omission or gross neglect in wrongful death actions brought by or on behalf of a surviving spouse or heirs of the decedent's body."[179] Malice, as defined by Texas statutes, has both gross negligence and intentional conduct components for punitive damages recovery.[180] Texas also has a statutory cap on punitive damages requiring bifurcated trials and establishing a general punitive damages cap of "(1)(A) two times the amount of economic damages; plus (B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or (2) $200,000."[181]

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see, therefore, a court may henceforth award punitive damages only if it finds a defendant has acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly.").

[177] *Hodges*, 833 S.W.2d at 901. A trial is required to be bifurcated between compensatory and punitive damages phases. *Id.*

[178] *Id.* For example, the following are some of these factors: "(2) The nature and reprehensibility of defendant's wrongdoing, for example (A) The impact of defendant's conduct on the plaintiff, or (B) The relationship of defendant to plaintiff; (3) The defendant's awareness of the amount of harm being caused and defendant's motivation in causing the harm; (4) The duration of defendant's misconduct and whether defendant attempted to conceal the conduct." *Id.* This is identical language to MISS. CODE ANN. § 11-1-65(1)(e) (2002 & Supp. 2003).

[179] TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon 1996 & Supp. 2003). Bad faith does not justify punitive damages in § 41.003(b). *Id.* § 41.003(b) ("This burden of proof may not be shifted to the defendant or satisfied by evidence of ordinary negligence, bad faith, or a deceptive trade practice.").

[180] *Id.* § 41.001 (Malice means: "(A) a specific intent by the defendant to cause substantial injury to the claimant; or (B) an act or omission: (i) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.").

[181] *Id.* § 41.008(b). However, there are fifteen exceptions to the statutory cap mostly involving felonious behavior such as murder, robbery or fraud. *Id.* § 41.008(c).

Thus, our comparative survey of state punitive damages standards reveals that the development of punitive damages jurisprudence in Mississippi from 1854 to the present is similar to that of other sister southern states from Florida to Texas. Almost all of these statutory or judicial procedural and substantive standards for the imposition of punitive damages are roughly the same, with the exception of the two states which do not allow punitive damages for bad faith insurance practices.

However, state law was not the only law which was developing through this period of time. Federal law, which Mississippi left behind in 1885, has also developed standards for the imposition of punitive damages, accelerating its growth in response to external stimuli, particularly over the last ten years. This analysis will now focus on the development of federal punitive damages law before making some conclusions about the future of punitive damages law in Mississippi.

III. PUNITIVE DAMAGES AND THE DUE PROCESS CLAUSE

To be complete, any discussion of punitive damages under existing Mississippi law must include recent decisions of the United States Supreme Court. It is now well-settled that an excessive award of punitive damages violates the Due Process Clause of the Constitution. Challenges to excessive punitive damages awards raising both substantive and procedural due process claims had been made for some time, although the Supreme Court had declined to consider the issue in cases that were not ripe for review.[182] However, in less than a decade the Supreme Court has substantially repainted the punitive damages landscape.

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[182] In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 820 (1986), appellant argued that the imposition of punitive damages was impermissible under the Eighth Amendment and violated the Due Process Clause of the Fourteenth Amendment. The Court held that the "arguments raise important issues which, in an appropriate setting, must be resolved; however, our disposition of the recusal-for-bias issue makes it unnecessary to reach them." *Lavoie*, 475 U.S. at 828-29; *see also* Bankers Life & Cas. Co. v Crenshaw, 486 U.S. 71, 76-80 (1988) (refusing to consider claims that punitive damages awards violated Due Process Clause since they had not been raised or considered in state court). In *Browning-Ferris Industries v. Kelco*, 492 U.S. 257, 276-77 (1989), the Court declined to consider a claim of excessiveness under the Due Process Clause of the Fourteenth Amendment since defendants had "failed to raise their due process argument before either the district court or the court of appeals, and made no specific mention of

Arguably the first case in which the Supreme Court discussed criterion to determine if an award of punitive damages amounted to a due process violation was *Pacific Mutual Life Insurance Co. v. Haslip.*[183] In *Haslip*, defendants appealed, on due process grounds, a punitive damages award amounting to more than four times the amount of compensatory damages.[184] The Court held that Alabama's *procedural* scheme, including appropriate jury instructions and post-verdict review, provided adequate safeguards to ensure procedural due process.[185] Significantly, the Court also noted that it could not fashion "a mathematical bright line between the constitutionally acceptable and constitutionally unacceptable that would fit every case."[186]

Two years later, the Court decided *TXO Production Corp. v. Alliance Resources Corp.*[187] In *TXO*, the plaintiff was awarded $19,000 in compensatory damages for slander of title.[188] The plaintiff was also awarded $10 million in punitive damages.[189] On appeal, TXO argued that the punitive damages award was excessive and constituted a denial of due process.[190] The Court held that the punitive damages award was proper.[191] Once again, the Court declined to create a "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable."[192] However, the Court now considered the issue of excessive punitive damages awards under the substantive component of the Due Process Clause.[193]

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it in their petition for certiorari in this Court." *Kelco*, 492 U.S. at 277.

[183] 499 U.S. 1 (1991).

[184] *Haslip*, 499 U.S. at 7 n.2.

[185] *Id.* at 23.

[186] *Id.* at 18.

[187] 509 U.S. 433 (1993).

[188] *TXO*, 509 U.S. at 446.

[189] *Id.* at 447.

[190] *Id.* at 452.

[191] *Id.* at 458-62.

[192] *Id.* at 458.

[193] *Id.* "And, to echo *Haslip* once again, it is with this concern for reasonableness in mind that we turn to petitioner's argument that the punitive award in

Justice O'Connor criticized the plurality for failing to provide trial and appellate court with guidance in the form of objective standards to determine (rather than or determine) whether a punitive damages award was excessive and consequently in violation of the Due Process Clause.[194] In addition, the Court's consideration of excessive punitive damages awards under the substantive component of the Due Process Clause prompted Justice Scalia, in a concurring opinion, to note that the Due Process Clause did not create a substantive due process right to reasonable punitive damages.[195] Interestingly, it would be the dissent in *TXO*, and its call for the Court to provide "guideposts" for evaluating excessive punitive damage awards under the substantive component of the Due Process Clause, that would set the stage for the Court's next historic decision.

A. *BMW of North America, Inc. v. Gore*

In 1996, the Court decided *BMW of North America, Inc. v. Gore*.[196] BMW of North America had a nationwide policy regarding BMW automobiles that had been damaged during

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this case was so 'grossly excessive' as to violate the substantive component of the Due Process Clause." *Id.*

[194] *Id.* at 472-501 (O'Connor, J., dissenting).

> But the course the plurality chooses is, in fact, no course at all. The plurality opinion erects not a single guidepost to help other courts find their way through this area . . . . Our inability to discern a mathematical formula does not liberate us altogether from our duty to provide guidance to courts that, unlike this one, must address jury verdicts such as this on a regular basis. On the contrary, the difficulty of the matter imposes upon us a correspondingly greater obligation to provide the most coherent explanation we can. I agree with the plurality that we ought not adopt TXO's or respondents' suggested approach as a rigid formula for determining the constitutionality of punitive damages verdicts. But it does not follow that, in the course of deciding this case, we should avoid offering even a clue as to our own.

Id. at 480 (O'Connor, J., dissenting).

[195] *Id.* at 470-72 (Scalia, J., concurring). "I do not, however, join the plurality opinion, since it makes explicit what was implicit in *Haslip*; the existence of a so-called 'substantive due process' right that punitive damages be reasonable." *Id.* at 470 (Scalia, J. concurring).

[196] 517 U.S. 559 (1996).

assembly or in transit to the dealer destinations.[197] In the event that the cost of repair exceeded three percent of the car's suggested retail price, the automobile was placed in company service and later sold as a used vehicle.[198] If the repair did not exceed three percent of the suggested retail price, the automobile was sold as new without advising the dealer that any repairs had been made.[199] Because the cost of repainting Gore's automobile did not exceed three percent of the suggested retail price, BMW did not disclose the damage or repair to the dealer in Birmingham, Alabama.[200] Several months after purchasing his new BMW, Gore took the car to an independent detailer to make it look "snazzier."[201] The detailer detected that Gore's new BMW had been repainted.[202] Convinced that he had been cheated, Gore brought suit against BMW of North America, alleging that the failure to disclose that his car had been repainted was suppression of a material fact.[203] Gore alleged that his repainted car was worth less than an unrefinished one; to support his punitive damages claim, Gore showed that BMW had sold 983 refinished cars as new since 1983, including fourteen in Alabama, while failing to disclose that the cars had been repainted before sale.[204] In defense, BMW argued that it was under no obligation to disclose repairs of minor damage to new cars and that an award of punitive damages was not appropriate.[205] Moreover, BMW argued that evidence of transactions outside of Alabama had no relevance to Gore's claims.[206] The jury ultimately awarded Gore $4000 in compensatory damages and $4 million in punitive damages.[207] The post-trial motion made by BMW requesting the court to set aside the jury's punitive damage award was denied.[208] In support of its motion, BMW introduced evidence that its nondisclosure policy was valid under twenty-five states' laws[209] and that prior to Gore's claim, the nondisclosure policy had never been held unlawful in Alabama.[210] The Alabama Supreme Court reduced the punitive damages award to $2 million, finding that the jury improperly computed punitive damages based upon the defendant's similar conduct in other jurisdictions.[211]

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[197] *Gore*, 517 U.S. at 563.

[198] *Id.*

[199] *Id.* at 564.

[200] *Id.* The purchase price of the vehicle was $40,750.88. The actual cost of repair totaled $601.37. *Id.* at 563-64.

[201] *Id.* at 563.

[202] *Id.*

[203] *Id.*

[204] *Id.* at 564.

[205] *Id.*

[206] *Id.*

[207] *Id.* at 565.

The call for guidance expressed by the dissent in *TXO* was about to be realized. The Court would consider BMW's due process argument, "[b]ecause we believed that a review of this case would help to illuminate 'the character of the standard that will identify unconstitutionally excessive awards' of punitive damages."[212] Justice Stevens delivered the five to four majority decision.[213] The opinion opened with a recognition that the states necessarily have substantial flexibility in determining the levels of punitive damages that will be permitted.[214] It noted also that juries enjoy a similar latitude, "requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence."[215] Only when an award can fairly be categorized as "grossly excessive" when compared to these state interests does it become arbitrary and violative of the Fourteenth Amendment's Due Process Clause.[216]

The first significant pronouncement in *Gore* was the proposition that punitive damages may not be imposed as a sanction for conduct which was lawful outside of the forum state.[217] In other words, Alabama could not impose sanctions in the form of punitive damages in order to deter conduct which was lawful in other jurisdictions.[218] Next, the Court identified three guideposts which tend to give an indicia of reasonableness to a punitive damages award. The guideposts are: the degree of reprehensibility,[219] the disparity between the harm or potential harm suffered[220] and the difference between the remedy and the civil penalties imposed in comparable cases.[221]

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[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Id.* at 566-67.

[212] *Id.* at 568.

[213] *Id.* at 561.

[214] *Id.* at 568.

[215] *Id.*

[216] *Id.*

[217] *Id.* at 572-74. Gore had argued that a large punitive damages award was needed to induce BMW to alter its nationwide repair and nondisclosure policy. The Court rejected the argument finding that by attempting to alter BMW's con-

It is significant to note that the Court declined once again to announce a bright line or mathematical formula to compare actual and potential damages to the punitive award.[222] However, the Court did cite to *Haslip* and *TXO* for the proposition that a punitive award of four times the amount of compensatory damages might be close to the line of constitutional impropriety and that, including a factor of likely or potential harm in the equation, the relevant ratio suggested was not more than ten to one.[223] Ultimately, the Court held that the $2 million punitive damages award, five hundred times the amount of Gore's actual economic harm, violated the Due Process Clause and remanded the case to the Alabama courts.[224] Justice Scalia, joined by Justice Thomas, dissented.[225] According to Justice Scalia, the Constitution did not authorize inquiries by the Court into the propriety of punitive damages.[226]

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duct nationwide, Alabama would be infringing on the policy choices of other States. *Id.* at 573.

[218] *Id.* at 574.

[219] *Id.* at 575-84. In *Gore*, the Court noted that the degree of reprehensibility was the most important indicium of reasonableness and noted that Gore's injury, which amounted only to economic loss, was not sufficiently reprehensible to warrant imposition of a large punitive damages award. *Id.* at 576.

[220] *Id.* The Court identified the ratio between punitive damages and actual harm inflicted on the plaintiff as the most commonly cited indicium of reasonableness. *Id.* at 580.

[221] *Id.* The Court noted that the maximum fine authorized by the Deceptive Trade Practices Act was $2000. *Id.* at 584.

[222] *Id.* at 582-83.

[223] *Id.* at 581.

[224] *Id.* at 586.

[225] *Id.* at 598 (Scalia, J., dissenting).

[226] *Id.* (Scalia, J., dissenting).

I do not regard the Fourteenth Amendment's Due Process Clause as a se-

B. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*

Five years after *Gore*, the Court decided *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[227] *Leatherman* is significant because the Court announced the standard of review applicable to district court decisions regarding the constitutionality of punitive awards.[228] Prior to *Leatherman* there was "confusion among the circuits."[229]

In the 1980s, Leatherman Tool Group had designed and marketed its multifunction Pocket Survival Tool (PST).[230] In 1995, Cooper Industries marketed a competing multifunction tool under the name ToolZall.[231] Contending that the ToolZall was a copy of the PST, Leatherman filed a complaint in district court alleging "trade-dress infringement, unfair competition and false advertising, . . . and a common-law claim of unfair competition for advertising and selling an 'imitation' of the PST."[232] The jury returned a verdict in favor of Leatherman and awarded $50,000 in compensatory damages and $4.5 million in punitive damages.[233] The district court rejected Cooper's arguments that the punitive damages were "grossly

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> cret repository of substantive guarantees against "unfairness"—neither the unfairness of an excessive civil compensatory award, nor the unfairness of an "unreasonable" punitive award. What the Fourteenth Amendment's procedural guarantee assures is an opportunity to contest the reasonableness of a damages judgment in the state court; but there is no federal guarantee a damages award actually *be* reasonable.

Id. at 598-99 (Scalia, J., dissenting). "By today's logic, *every* dispute as to evidentiary sufficiency in a state civil suit poses a question of constitutional moment, subject to review in this Court. That is a stupefying proposition." *Id.* at 607 (Scalia, J., dissenting). Justice Ginsburg, joined by the Chief Justice, also dissented. *Id.* (Ginsburg, J., dissenting). They concurred with Justice Scalia's observations that the Court unnecessarily intruded into an area "dominantly of state concern." *Id.* (Ginsburg, J., dissenting).

[227] 532 U.S. 424 (2001).

[228] *Leatherman*, 532 U.S. at 443.

[229] *Id.* at 431.

[230] *Id.* at 427. The Court generally described the PST as a "multi-function pocket tool which improves on the classic 'Swiss army knife' in a number of respects." *Id.*

[231] *Id.*

[232] *Id.* at 428.

[233] *Id.* at 429.

excessive" under *Gore*.[234] The court of appeals affirmed, concluding that the district court had not abused its discretion in declining to reduce the amount of punitive damages.[235] The United States Supreme Court vacated the judgment and remanded the case.[236] The Court held that "courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards."[237] In addition, the Court concluded that, unlike jury determinations of compensatory damages, a jury "award of punitive damages does not constitute a finding of 'fact,'" and, consequently, "appellate review of the district court's determination that an award is consistent with due process does not implicate the Seventh Amendment."[238] Justice Thomas concurred; however, he reiterated that in his view, "the Constitution does not constrain the size of punitive damages."[239] Justice Scalia also concurred in the judgment and repeated the view he expressed in *Gore* that "excessive punitive damages do not violate the Due Process Clause."[240]

C. *State Farm Mutual Automobile Insurance Co. v. Campbell*

The most recent Supreme Court decision regarding excessive punitive damages awards is *State Farm Mutual Automobile Insurance Co. v. Campbell*.[241] Campbell was driving his automobile when he decided to pass six vans traveling ahead of them on a two-lane highway.[242] Campbell's conduct resulted in a motor vehicle collision in which one person was killed and another permanently disabled, though the Campbells escaped without injury.[243] Ultimately, Campbell was named in a wrongful death and tort action.[244] Early investigations confirmed that Campbell's actions caused the collision.[245] Nonetheless, State Farm decided to contest liability and declined offers to settle all claims for policy limits.[246] State Farm took the case to trial, assuring the Campbells that "their assets were safe [and] that they had no liability for the accident."[247] In addition, State Farm told the Campbells they did not need separate counsel.[248] The jury returned a verdict against the Campbells for $185,849.[249] At first, State Farm refused to cover the excess liability and advised the Campbells that "you may want to put for sale signs on your property to get things moving."[250] State Farm refused to post a supersedeas bond.[251] Finally, the Campbells retained counsel to appeal the verdict.[252] Campbell's appeal in the wrongful death and tort actions was denied by the Utah Supreme Court.[253] The entire judgment, including the amounts in excess of the policy limits, was then paid by State Farm.[254]

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[234] *Id.*

[235] *Id.* at 431.

[236] *Id.* at 443.

[237] *Id.* at 436.

[238] *Id.* at 437.

[239] *Id.* at 443 (Thomas J., concurring). Justice Thomas also noted that given the opportunity, not present in *Leatherman*, he would overrule *Gore*. *Id.* (Thomas J., concurring).

[240] *Id.* (Scalia, J., concurring).

[241] 123 S. Ct. 1513 (2003).

[242] *Campbell*, 123 S. Ct. at 1517.

The Campbells then sued State Farm for bad faith, fraud and intentional infliction of emotional distress.[255] Citing *Gore*, State Farm requested the exclusion of evidence of dissimilar out-of-state conduct.[256] The trial court denied State Farm's motion.[257] The Campbells were awarded $2.6 million in compensatory damages and $145 million in punitive damages.[258] The award was reduced to $1 million compensatory and $25 million in punitive.[259] The Utah Supreme Court reinstated the $145 million punitive damages award.[260]

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[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] The policy limit was $50,000 ($25,000 per claimant). *Id.* at 1518.

[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] *Id.* at 1519.

The Court turned again to the guideposts announced in *Gore*.[261] It reaffirmed its view that "[t]he degree of reprehensibility of the defendant's conduct" was "the most important indicum of the reasonableness of a punitive damages award."[262] Additionally, the Court identified factors to consider in determining the reprehensibility of a defendant's conduct.[263] Those factors include:

> the harm caused was physical as opposed to economic; the tortuous conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.[264]

Significantly however, the Court also noted:

> The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.[265]

The Court also noted that while State Farm's conduct "merits no praise," the Utah courts had improperly considered vast amounts of evidence of nationwide conduct instead of conduct that had directly effected the Campbells.[266] The Court noted that "out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff."[267] Moreover, "[a] jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."[268]

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[259] *Id.*

[260] *Id.*

[261] *Id.* at 1521.

[262] *Id.* (quoting BMW of N. Am. v. Gore, 517 U.S. 559, 575 (1996)).

[263] *Id.*

[264] *Id.*

[265] *Id.*

[266] *Id.* The Court noted that State Farm had been sanctioned as a result of

Turning to the second *Gore* guidepost, the Court began by again noting, "we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award."[269] However, the Court underscored the ratios in *Haslip* and *Gore*, indicating that "[s]ingle-digit multipliers are more likely to comport with due process."[270] The Court also noted the absence of rigid benchmarks that a punitive damages award may not surpass, and that greater ratios may be justified where particularly egregious conduct results in only small amounts of economic damages.[271] Conversely, where compensatory damages are substantial, a smaller ratio equal to compensatory damages, would "reach the outermost limit of the due process guarantee."[272] Finally, the Court touched again on the third *Gore* guidepost, i.e., "the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases.'"[273]

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evidence relating to its "Performance, Planning and Review" policy. *Id.* The case had been "used as a platform to expose . . . the perceived deficiencies of State Farm's" nationwide policy which was legal in many States. *Id.* In addition, State Farm was being punished for conduct which "bore no relation to the Campbells' harm." *Id.* at 1523.

[267] *Id.* at 1522.

[268] *Id.* at 1522-23.

[269] *Id.* at 1524.

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] *Id.* at 1526 (citing BMW of N. Am. v. Gore, 517 U.S. 559, 575 (1996)). The Court did not elaborate on the third *Gore* guidepost, noting that $10,000 appeared to be the limits on civil sanctions for fraud under Utah law. *Id.* The Fifth Circuit has recently applied the third *Gore* guidepost in reducing a punitive damages award of $100,000 to $55,000, the statutory maximum civil penalty for improper conduct under the Fair Housing Act. *See* Lincoln v. Case, 340 F.3d 283, 294 (5th Cir. 2003).

Justices Thomas and Scalia dissented essentially for the same reasons they articulated in *Gore* and *Leatherman*, taking the moment to reemphasize their view "that the Due Process Clause provides no substantive protections against 'excessive' or 'unreasonable'" punitive damages awards.[274] Justice Ginsburg pointed out in her dissent that it would be better if state legislatures solved problems regarding punitive damages awards by enacting laws limiting their size, rather than having the Supreme Court substitute its own judgment for that of the state legislature.[275] Justice Ginsburg warned that the Court's second *Gore* guidepost had been converted into "instructions that begin to resemble marching orders."[276]

Since the decision in *Campbell*, numerous cases have been remanded for review of punitive damages awards.[277] The law will no doubt continue to evolve. It will, of course, be interesting to see how the trial and appellate courts adapt to the guidance the Supreme Court has provided in the administration of punitive damages awards.

CONCLUSION

The era of punitive damages in American jurisprudence is far from over. A glance at today's headlines indicate that with a properly motivated jury gigantic punitive damage verdicts are still possible. On November 14, 2003, an Alabama jury awarded $63.6 million in compensatory damages and $11.8 billion in punitive damages to the State of Alabama against ExxonMobil for alleged fraud in the calculation of lease payments owed to the State of Alabama for oil leases along the coast of Alabama.[278] The verdict, which was two billion dollars more than the State's attorneys asked for, resulted from an opinion by the jurors that ExxonMobil's size and wealth required a huge verdict in order to punish them.[279] The punitive damages ratio in this case is 185.53 times the compensatory damages award. On November 15, 2003, the very next day, the Mississippi State Medical Association announced its plans to shut down health and medical malpractice insurance for its members beginning December 31, 2003.[280] This program had apparently lost over $4 million from July 2002 to the present.[281]

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[274] 123 S. Ct. at 1526 (Scalia, J., dissenting).

[275] *Id.* at 1531 (Ginsburg, J., dissenting).

[276] *Id.* (Ginsburg, J., dissenting).

[277] *See, e.g.,* Cass v. Stephens, 123 S. Ct. 2213 (2003); Ford Motor Co. v. Ramon Romo, 123 S. Ct. 2072 (2003); Dekalb Genetics Corp. v. Bayer Crop-Science, S.A., 123 S. Ct. 1818 (2003).

[278] Phillip Rawls, Associated Press, *$11 Billion Royalties Verdict Hits Exxon*, CHATTANOOGA TIMES FREE PRESS (Tenn.), Nov. 15, 2003, at C1.

Further, differing perspectives on how to apply punitive damages are likely to appear. Recently, the Mississippi Court of Appeals appeared to apply a "made whole" rule to the appropriateness of punitive damages, stating:

> No fundamental right belonging peculiarly to Brown is protected in the matter of a possible assessment of **punitive** damages since he has already been made whole by the verdict for actual damages, which is the declared purpose of a civil proceeding for damages.[282]

At one point, there was a line of thought that developed holding that legislatures would likely pass on tort reform in 2003, upon the grounds that *State Farm v. Campbell*'s jurisprudential effect would resolve a significant portion of concern about excessive punitive damages. However, the two recent headlines above indicate that a fresh public debate is likely to begin anew as the Mississippi legislature prepares its chambers for the new 2004 session. Further, since the issue of tort reform was a significant plank in the platform of both the Mississippi Governor and Lieutenant Governor, political pressure will undoubtedly be present to continue further curbs on the imposition of punitive damages in the name of controlling runaway verdicts.[283]

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[279] *Id.* According to one of the jurors, L.A. Wallace, a plastics factory worker, "A billion dollars to them is chump change." *Id.* Joe King, the jury foreman and a teacher, asserted that the jury wanted to "send a message" that the corporation "can't get away with doing wrong." *Id.*

[280] Shelia Hardwell Byrd, Associated Press, *MSMA Ending Insurance Program*, CLARION-LEDGER (Jackson, Miss.), Nov. 15, 2003, at A1.

[281] *Id.* The losses had already forced premium hikes of between ten and forty-nine percent before the MSMA's shutdown of the program. *Id.*

[282] Brown v. N. Jackson Nissan, Inc., 856 So. 2d 692, 697 (Miss. Ct. App. 2003) (emphasis added). The Mississippi Court of Appeals was rejecting an argument that failure to consider punitive damages was plain error, in that the appellant had not raised the issue of punitive damages to the jury at the trial, although he had alleged it. *Brown*, 856 So. 2d at 696-97. The *Brown* Court found no plain error, in that punitive damages are not a "fundamental right," as is the right to compensatory damages, but instead are a means to punish a wrongdoer. *Id.* at 697. Thus, there was no right prejudiced and the "plain error" rule did not thus apply. *Id.*

However, on an even more fundamental level, one should not expect the debate over punitive damages to simply fade away over time. The issue itself involves many fundamentally differing points of view, not only liberal versus conservative or pro-business versus pro-consumer, but also a philosophical division of what punitive damages should accomplish, whether they exist only to punish the wrongdoer in a certain case, or alternatively, whether they exist as a public policy tool to eradicate a wrongdoer as an economic force.[284] Because of these basic, unresolved and likely unresolvable differences of opinion concerning the application of punitive damages over different times and circumstances, the issue of punitive damages is likely to continue to be a hot-button political and legal issue for years to come.

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[283] Haley Barbour, The Need for Tort Reform, Address at the Mississippi College School of Law (Mar. 27, 2003), *at* http://www.haleybarbour.com// MCLaw.htm. Barbour further stated that "The punitive damages cap in our statute also should be revised. For one reason, we are not really sure what it means. As you know this is a punitive damages cap that is associated with net worth. But it's unclear to most people whether that cap is per plaintiff or per case. And in these mass tort cases, companies can be at risk for punitive damages for 100 times their net worth if there are 2500 plaintiffs, which is not that unusual." *Id.* Amy Tuck has also asserted that continued tort reform will be a priority on her agenda, stating "Further reforming our legal system and fighting those saying we need tax increases are keys to ensuring there are plenty of jobs and opportunity for typical Mississippians." Michael Goode, *Tuck Receives Endorsement of Small Business*, *at* http://www.amytuck.com/NFIB.htm (July 24, 2003).

[284] It is exactly that point, that lawsuits and punitive damages are appropriate means to wipe out a perceived risk to the public, which Dr. Stanton Glantz, a vocal leader of the anti-tobacco health community, noted in his interview with PBS *Frontline* journalists when he stated that "[w]ell that wouldn't be a bad thing, to have the tobacco industry disappear," in stating his opposition to Richard Scruggs' and Mike Moore's proposed tobacco settlements which would also grant cigarette manufacturers some immunities from lawsuits in favorable venues like Mississippi. *Frontline: Inside the Tobacco Deal* (PBS television broadcast, May 12, 1998) (Interview with Dr. Stanton Glantz), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/settlement/interviews/glantz.html.

PRE-1900 MISSISSIPPI LEGAL AUTHORITY

Michael H. Hoffheimer,[*] *Kris Gilliland,*[**]
and Lynn Murray[***]

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I. INTRODUCTION

Recent articles making extensive use of pre-1900 Mississippi legal sources indicate the growing historical and legal interest in these materials.[1] Unfortunately, there is no authoritative catalogue of such sources, and there is often no accepted convention regarding their citation.[2]

This article is designed to provide a reliable catalogue of principal pre-1900 legal sources and to suggest uniform rules for citing them. Part II offers a short overview of Mississippi legal history. Part III surveys the individual sources of legal authority: session laws; codes and statutory compilations; state constitutions; and published decisions of Mississippi courts. Part IV discusses secondary state legal authority from the nineteenth-century. Appendix I contains a complete list of legislative session laws. Appendix II surveys Blackstone's influence on early state codes. Appendix III provides a catalog of pre-1900 secondary legal authority from Mississippi. Appendix IV proposes uniform citation forms.

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[1] *See, e.g.*, Kris Gilliland, *Mississippi Territory*, *in* PRE-STATEHOOD LEGAL MATERIALS: A RESEARCH GUIDE TO THE FIFTY STATES (Michael Chiorazzi & Marguerite Most eds., forthcoming 2003); Michael H. Hoffheimer, *Murder and Manslaughter in Mississippi: Unintentional Killings*, 71 MISS. L.J. 35-152 (2001); Michael P. Mills, *Slave Law in Mississippi from 1817 to 1861: Constitutions, Codes and Cases*, 71 MISS. L.J. 153-239 (2001); Michael H. Hoffheimer, *Mississippi Courts: 1790-1868*, 65 MISS. L.J. 99-170 (1995).

[2] *The Bluebook* provides no examples for citing such sources. *Cf.* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 211-12 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000) (setting forth examples for Mississippi legal authorities) (hereinafter THE BLUEBOOK). *The Bluebook* does not provide examples of any statutory compilation prior to the current version of the Mississippi Code Annotated, which is to be cited as MISS. CODE ANN. § x (year). The practice of most legal publications, including the *Mississippi Law Journal*, has been to insert in the parentheses the publication date of the volume cited rather than the date of the code. This is necessary because the text can change as volumes are updated. Nevertheless, this practice omits the official name and originating date of the current code—the "Mississippi Code of 1972 Annotated." *See* MISS. CODE ANN. § 1-1-8(1)-(2) (Supp. 2001) (referring to official code as "Mississippi Code of 1972 Annotated" and prohibiting any person other than the authorized publisher from employing any combination of these names in the title).

Although *The Bluebook* provides a format for session laws ("year Miss. Laws xxx"), this format is unsatisfactory for older volumes of session laws because older volumes may cover sessions that lasted more than one calendar year, and numerous calendar years saw the publication of more than one volume.

In the absence of specific examples, law reviews must resort to the general citation rules established by *The Bluebook*. Historical sources can pose some special challenges for what student editors call "theoretical bluebooking." As a result, different editors may adopt inconsistent or conflicting forms of citation.

II. SUMMARY OF MISSISSIPPI LEGAL HISTORY

Territorial Period (1798-1817). The Mississippi Territory, comprising most of the future states of Alabama and Mississippi, was created in 1798 by an act of Congress. The act provided that the territorial government should be similar to that of the Northwest Territory except that slavery was permitted.[3] Under the Northwest Ordinance, a provisional government was organized until the population was sufficient for a territorial legislature. Under this provisional government, a single governor and three judges exercised the power to "adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district . . . ."[4]

In January 1799, Governor Winthrop Sargent and judges of the Mississippi Territory began adopting—or making—laws.[5] The collection of the initial acts of 1799 to 1800

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[3] Act of Apr. 7, 1798, 1 Stat. 549 (1798). *See also* Act of May 26, 1790, 1 Stat. 123 (1790) (predecessor legislation permitting slavery in territory south of Northwest Territory).

[4] Northwest Ordinance of 1787 § 5, *reprinted in* U.S.C.A. Const. 18 (West 1987).

[5] The Territory's first laws were published in Natchez by Andrew Marschalk in 1799 under the formidable title *Laws of the Mississippi Territory Published at a Session of the Legislature Began [sic] in the Town of Natchez, in the County of Adams, and Territory Aforesaid, Upon the 22d Day of January Anno Domini 1799, and in the 23d Year of Independence of the United States of America: and Continued by Adjournments to the 25th Day of May, in the Same Year: By Authority.* For the history of the earliest printing of the laws, see Charles S. Sydnor, *The Beginning of Printing in Mississippi*, 1 J. S. HIST. 49, 52 (1939). According to Sydnor, Marshalk was on active military duty from 1798-1800 but was "loaned" by his commanding officer to the governor for the purpose of printing the territorial laws. *Id.* at 51.

Governor Sargent, a federalist and former Secretary of the Northwest Territory, proved unpopular with the inhabitants of the Mississippi Territory. The governor's critics protested that some of the legislation was not copied from existing state statutes and thus exceeded the governor's authority. Critics also objected became known as Sargent's Code, though the designation as a "code" is purely honorific because the laws were never assembled in the form of a code.[6] In 1800, the Territory was authorized to elect a General Assembly, and the legislative session laws were published regularly from 1800 to 1816.[7] An official

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that the punishment for arson (which included forfeiture of property) violated the federal constitution. *See generally* JOHN R. SKATES, MISSISSIPPI: A BICENTENNIAL HISTORY 57 (1989); Michael H. Hoffheimer, *Murder and Manslaughter in Mississippi*, 71 MISS. L.J. 35, 54 n.45 (2001); Michael H. Hoffheimer, *Mississippi Courts: 1790-1868*, 65 MISS. L.J. 99, 104 n.14 (1995). For a critical account of Governor Sargent's lawmaking, see the redeemer historical presentation by ROBERT LOWRY & WILLIAM H. MCCARDLE, A HISTORY OF MISSISSIPPI FROM THE DISCOVERY OF THE GREAT RIVER BY HERNANDO DESOTO 169 (Jackson, Miss., R.H. Henry & Co. 1891).

Even before the arrival of the second judge, the governor took emergency steps to appoint conservators of the peace, citing "impervious Necessity." Letter from Governor Sargent to Timothy Pickering (Sept. 29, 1798), *in* 1 MISSISSIPPI TERRITORIAL ARCHIVES 1798-1803: EXECUTIVE JOURNALS OF GOVERNOR WINTHROP SARGENT & GOVERNOR WILLIAM CHARLES COLE CLAIBORNE 53 (Dunbar Rowland ed., 1905). The governor also implicitly assumed that certain common law criminal laws applied and authorized the conservators to suppress unlawful activity and to arrest criminals pending the establishment of a territorial supreme court. *See generally* P.L. Rainwater, *Introduction* to SARGENT'S CODE: A COLLECTION OF THE ORIGINAL LAWS OF THE MISSISSIPPI TERRITORY ENACTED 1799-1800 BY GOVERNOR WINTHROP SARGENT AND THE TERRITORIAL JUDGES ii (1939); Hoffheimer, *Mississippi Courts: 1790-1968*, *supra* note 1, at 107.

The executive journals contain correspondence and appointments, but they also contain early legal documents similar to court orders. *Cf.* Proclamation of Governor Sargent (Apr. 27, 1799) *in* MISSISSIPPI TERRITORIAL ARCHIVES 1798-1803, *supra* at 145 (postponing session of courts). They also contain early legal documents similar to executive orders. *Cf.* Proclamation of Governor Sargent (Oct. 23 1798) *in* MISSISSIPPI TERRITORIAL ARCHIVES 1798-1803, *supra* at 59-60 (threatening fine and imprisonment for those wrongfully sitting on federal or Indian lands).

[6] *Sargent's Code* is best known in its reprint version. SARGENT'S CODE, *supra* note 5. The text of this edition was compiled as part of a Depression-era federal project from the original manuscripts in the state archives. Unfortunately, the bibliographic information provided in the introduction to that reprint is erroneous. The editors claim that only the first twenty-five laws were ever published. *Id.* at i. In fact, the January 1799 session laws originally published by Andrew Marschalk were regularly supplemented. Sydnor, *supra* note 5. A list of errata was also published. Laws passed in September 1799 were issued, and laws issued in October 1800 were printed and paginated sequentially. The editors' claim suggests they had access only to the original January session laws and assumed incorrectly that the other statutes were never published. As a result, the reprint edition does not preserve the order of the original session laws.

[7] After the territory achieved "second grade" status, characterized by an

compilation of the territorial statutes was approved in 1807,[8] and a second authoritative compilation appeared in 1816.[9]

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elected General Assembly, nine biennial General Assemblies were elected and most published at least two sessions of laws:

assembly	*session*	*date*
1st	1)	1800
	2)	1801
	3)	1802
2d	1)	1802
	2)	1803
3d	1)	1804
	2)	1805
	extra)	1805
4th	1)	1806
	2)	1807
5th		1809
6th	1)	1809
	2)	1810
7th	1)	1811
	2)	1812
8th	1)	1813
	2)	1814
9th	1)	1815
	2)	1816

See generally DOUGLAS C. MCMURTRIE, A BIBLIOGRAPHY OF EARLY MISSISSIPPI IMPRINTS 1798-1830 (Beauvoir Community, Miss., The Book Farm 1945). The session laws are available on microform. Some of these are reprinted in Heartman's Historical Series nos. 54, 55, 73 (William D. McCain ed. 1947) and in microform as part of the Early American Imprints series. (The Early American Imprints sets are invaluable research resources and also include reproductions of the acts and legislative journals of the Mississippi Territory.). For the most complete published list, see 1 PIMSLEUR'S CHECKLISTS BASIC AMERICAN LEGAL PUBLICATIONS (Marcia S. Zubrow ed., 2002) (AALL Publ'ns Series No. 4). The official printers sometimes also printed journals for the sessions. *E.g.*, McMurtrie, *supra* at 49, 59, 63 (listing journals published for 1807, 1812, 1814).

[8] *See infra* note 181. Act of Feb. 10, 1807, *in* STATUTES OF THE MISSISSIPPI TERRITORY; THE CONSTITUTION OF THE UNITED STATES, WITH THE SEVERAL AMENDMENTS THERETO; THE ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES, NORTH-WEST OF THE RIVER OHIO; THE ARTICLES OF AGREEMENT AND CESSION, BETWEEN THE UNITED STATES AND THE STATE OF GEORGIA; AND SUCH ACTS OF CONGRESS AS RELATE TO THE MISSISSIPPI TERRITORY 245-48 (Peter Isler 1816) [hereinafter STATUTES OF THE MISSISSIPPI TERRITORY] (approving the text of the digest and directing its updating by territorial judge Harry Toulmin). This 1816 compilation was digested by Edward Turner and was known as "Turner's Code" according to MCMURTRIE, *supra* note 7, at 74.

[9] STATUTES OF THE MISSISSIPPI TERRITORY, *supra* note 8, at 249-50 (setting

Statehood (1817 to 1900). Mississippi has had four state constitutions—1817, 1832, 1869 and 1890.[10] The Constitution of 1890, with many amendments, remains in force.[11] A bicameral legislature was a feature of every constitution, and from 1817 the state published official session laws—statutes and resolutions enacted by the legislature.

The proliferation of legislation led to numerous single acts aimed at consolidating prior bodies of statute law.[12] As legislation grew over time, and as appellate decisions interpreted legislation, there were repeated efforts to compile the statutes. Official revised codes appeared in 1824 (supplemented by an official compilation of laws from 1824 to 1838), 1840, 1857, 1871 and 1880. (New codes were proposed in 1834 and 1865 but never appeared.) A new authorized revised code, required

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forth text of Act of Dec. 9, 1815, authorizing publication of official digest).

[10] For a summary of the state constitutions, see JOHN W. WINKLE III, THE MISSISSIPPI STATE CONSTITUTION: A REFERENCE GUIDE 2 (1993). Territorial judge George Poindexter chaired the committee that drafted the constitution and was responsible for much of the state's first constitution. *See generally* MACK SWEARINGEN, THE EARLY LIFE OF GEORGE POINDEXTER: A STORY OF THE FIRST SOUTHWEST 146, 155 (1934); Winbourne Magruder Drake, *The Framing of Mississippi's First Constitution*, 29 J. MISS. HIST. 301-27 (1967); David G. Sansing, *Mississippi's Four Constitutions*, 56 MISS. L.J. 3, 5 (1986). The journal of the constitutional convention is reproduced in *The Journal of the Constitutional Convention of 1817*, 29 J. MISS. HIST. 443-504 (William F. Winter ed., 1967). This constitution borrowed heavily from other states. *See generally* Hoffheimer, *Mississippi Courts: 1790-1868*, *supra* note 1, at 116 n.72.

[11] Among important changes to the legal system were amendments to the Constitution of 1890 providing for an elected judiciary at all levels. *See infra* note 160.

[12] *E.g.*, Act of Feb. 14, 1828 § 1, 1828 Miss. Laws 72, MISS. LAWS 1824-1838, at 148-49 (1838) (amending "An Act to Reduce into One the Several Acts and Parts of Acts Concerning the Establishment, Jurisdiction and Powers of the Superior Courts of Law"); Act of June 28, 1822 § 4, June 1822 Miss. Laws 26, REV. CODE MISS. [POINDEXTER'S CODE] ch. 13 (1823) (consolidating various acts creating and regulating jurisdiction of superior courts of law); Act of June 11, 1822 § 1, June 1822 Miss. Laws 266-67, REV. CODE MISS. [POINDEXTER'S CODE] ch. 33 (1823) (consolidating acts concerning writs of habeas corpus and de hominem replegiando); Act of Nov. 26, 1821 § 1, 1822 Nov. 1821 Miss. Laws 37-84, REV. CODE MISS. [POINDEXTER'S CODE] ch. 9 (1823) (consolidating acts concerning wills and decedents' estates); Act of June 18, 1822 § 2, REV. CODE MISS. [POINDEXTER'S CODE] ch. 73 (1823) (amending acts consolidating slave laws); Act of June 20, 1822 §§ 1-2, June 1822 Miss. Laws 386, REV. CODE MISS. [POINDEXTER'S CODE] ch. 95 (1823) (consolidating acts regulating state militia).

by the Constitution of 1890[13] and containing annotations, appeared in 1892.[14]

An appellate court of last resort was also a regular feature of every state constitution. This court's jurisdiction varied over time. Its name also changed over time, from the Supreme Court of Mississippi to the High Court of Errors and Appeals and later back to the Supreme Court. This court issued written decisions in cases beginning in its June 1818 term. In 1834, authorized reporters collected and published its opinions, including its earliest ones.[15] The appellate court generally ceased functioning during the Civil War[16] and later attempted to retract the authority of Reconstruction Era decisions.[17] Unofficial reporters of decisions began appearing in 1887, and the unofficial reporters would eventually displace the official reports.[18] In 1887, the West regional reporters, the preferred citation source according to *The Bluebook*, began regularly publishing the opinions of the Mississippi Supreme Court.[19]

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[13] *See infra* note 86 and accompanying text.

[14] *See generally* R.H. THOMPSON, MISSISSIPPI CODES 24-27 (1926) (address delivered at annual meeting of Mississippi State Bar Association). Excerpts of this are available online at the Mississippi State Law Library web site. This site also presents an excellent chronological summary of each code and compilation and includes a photograph of the title page of each. *See* Mississippi Codes, *available at* http://library.mssc.state.ms.us/MSCodesAll.htm.

[15] In keeping with contemporary conventions, the early reporters also prepared statements of the case and summarized the arguments presented by both sides. The first reporter to publish opinions did not have access to earlier briefs and arguments, so these were generally omitted. *See* R.J. Walker, *Preface*, 1 Miss. (1 Walker) v (1834).

[16] The High Court of Errors and Appeals published no opinions between the October 1861 term and the April 1863 term, two for 1863 and none for 1864 or 1865. Garner concludes from this that it ceased operating. J. GARNER, RECONSTRUCTION IN MISSISSIPPI 40 (1901). But it is possible the court decided cases without reporting its opinions.

[17] Lusby v. Kansas City, Memphis & Birmingham R. Co., 19 So. 239, 242 (Miss. 1895) ("The opinions found in that volume are the utterances of a tribunal appointed by the military satrap who then ruled in a prostrate commonwealth, and have no other binding authority upon us than that each case therein must be regarded as res adjudicata.") (referring to volume 42 which contained the published opinions of the October 1868 and October 1869 terms). *Accord* In re Estate of Childress, 588 So. 2d 192, 195 n.4 (Miss. 1991); Ayers v. Petro, 417 So. 2d 912, 914 (Miss. 1982). The lack of authority of volume 42 was also argued by counsel in *Hendricks v. Kellogg*, 76 So. 746 (Miss. 1917) and *Timberlake v. Thayer*, 23 So. 767 (Miss. 1898). Nevertheless, opinions from volume 42 have been cited as authoritative in more than thirty opinions since 1895. (Opinions were reviewed Feb. 7, 2003 on LEXIS Miss library; Miss file employing the search: "42 Miss." w/5 186! and date aft 1895.)

For most of the nineteenth century, Mississippi had a separate system of equity administered by a chancery court (or courts) with changing jurisdiction. The most powerful chancery court, the Superior Court of Chancery, was created by the Constitution of 1832 and operated until abolished in 1857 by constitutional amendment. In 1842, the legislature required the reporting of chancery court decisions, "or so much thereof as the Chancellor shall direct . . . ."[20] Though the office of reporter was abolished before the first publication,[21] two separate unofficial volumes of reports of chancery decisions appeared in 1844.[22] A few chancery decisions and proceedings were also separately published later in the century.[23]

Chancery practice was evidently not large enough to support a market for secondary sources. Nineteenth-century Mississippi lawyers relied on works on the general law of equity, and the University of Mississippi law library holdings include numerous digests and manuals relating to equity practice in England and other states that came from old law offices.[24] Smedes's digest of Supreme Court decisions included chancery court opinions,[25] but practice manuals targeting state chancery court practice did not appear until the twentieth century.[26]

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[18] *See infra* notes 174-75. By the end of their publication run, the official reports were lagging so far behind the unofficial ones that they were able to print the parallel cite to the West Southern regional reporter. The last case to appear in an official reporter was *Wallace v. State*, 183 So. 2d 525 (Miss. 1966).

[19] The first published case was *Crum v. State*, 1 So. 1 (Miss. 1886), holding death from injury inflicted with malice was murder unless decedent's want of care or own neglect was the sole cause of death. The publication date on the title page of this volume is 1887.

[20] An Act to Provide for Reporting the Decisions of the Superior Court of Chancery § 1, 1842 Miss. Laws 210.

[21] Smedes and Marshall remark in their reports, "This volume . . . is offered to the profession as a work entirely of individual enterprise. It is unsupported by the patronage of the State; the legislature, at its last session, having abolished the office of reporter of that court, so far as his connection with the State extended." Advertisement, 1 Miss. Ch. (S. & M.) n.p. (1843).

[22] *See infra* note 171-72.

[23] *E.g.*, Joshua Green, no. 2439 v. W.H. Gibbs, Auditor, & C., and W.L. Hemingway, treasurer, & C., and ex-Officio Levee Commissioners, & C. (Memphis, Jones, Huhn & Co., ca. 1890); Arguments of W.L. Nugent, S.S. Calhoon and W.P. Harris, of Counsel for Jones S. Hamilton, L.M. Eubank, Wm. Hardy, J.W. Albrecht and W.H. Figures, Charged with the Murder of R.D. Gambrell, On Their Petition for the Writ of Habeas Corpus Before Chancellor E.G. Peyton (June 1887).

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[24] Twenty-five titles in the law school's collection are catalogued under the keyword "equity" with publication dates prior to 1830. One-hundred nine are catalogued under the keyword "equity" with publication dates prior to 1900. Early titles in the collection include American treatises on English equity practice or American editions of English treatises. *E.g.*, HENRY MADDOCK, A TREATISE ON THE PRINCIPLES AND PRACTICE OF THE HIGH COURT OF CHANCERY (Hartford, O.D. Cooke & Co. 1827). Numerous American and English editions report English chancery decisions. *E.g.*, DOMINICK T. BLAKE, PRACTICE OF THE COURT OF CHANCERY OF THE STATE OF NEW-YORK (Albany, Websters & Skinners 2d ed. 1824); REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF THE VICE CHANCELLOR OF ENGLAND (Henry Maddock ed., Am. ed. 1829); REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF CHANCERY 1789-1817 (Philadelphia, M. Carey & Son, Am. ed. 1821-1823); REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF CHANCERY 1818-1819 (New York, S. Gould 1822-1828).

The titles in the law school's collection from the end of the century include commercial titles that summarize general principles of equity practice for American practitioners. *E.g.*, JOHN ADAMS, THE DOCTRINE OF EQUITY (Philadelphia, T. & J. W. Johnson & Co. 1855); CHARLES FISK BEACH, MODERN PLEADING AND PRACTICE IN EQUITY IN THE FEDERAL AND STATE COURTS OF THE UNITED STATES (Cincinnati, W.H. Anderson & Co. 1894); ELIAS MERWIN, THE PRINCIPLES OF EQUITY AND EQUITY PLEADING (H.C. Merwin ed., Indianapolis, Bowen-Merrill 1895); BENJAMIN JONSON SHIPMAN, HANDBOOK OF THE LAW OF EQUITY PLEADING (St. Paul, West Publ'g Co. 1897); EDMUND H.T. SNELL, THE PRINCIPLES OF EQUITY INTENDED FOR THE USE OF STUDENTS AND THE PROFESSION (St. Louis, W.H. Stevenson 1885).

[25] A DIGEST OF THE CASES DECIDED AND REPORTED IN THE HIGH COURT OF ERRORS AND APPEALS AND THE SUPERIOR COURT OF CHANCERY OF THE STATE OF MISSISSIPPI FROM 1818 TO 1847 (Boston, C.C. Little & J. Brown 1847).

[26] VIRGIL ALEXIS GRIFFITH, MISSISSIPPI CHANCERY PRACTICE, EQUITY; BEING A HANDBOOK OF THE PRINCIPLES AND RULES OF PLEADING AND PRACTICE IN THE CHANCERY COURTS OF MISSISSIPPI IN THE EXERCISE OF THEIR EQUITY JURISDICTION, WITH FORMS FOR PLEADINGS, NOT INCLUDING PARTITION, ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, AND A FEW OTHER SUCH SUBJECTS WHICH, BY STATUTE, HAVE THEIR OWN SEPARATE AND SPECIAL PROCEDURE (E.W. Stephens Publ'g Co. 1925); VIRGIL ALEXIS GRIFFITH, MISSISSIPPI CHANCERY PRACTICE, EQUITY; BEING A HANDBOOK OF THE PRINCIPLES AND RULES OF PLEADING AND PRACTICE IN THE CHANCERY COURTS OF MISSISSIPPI IN THE EXERCISE OF THEIR EQUITY JURIS-

In addition to chancery court, there were numerous other courts of inferior jurisdiction. None published any decisions, but the need of Justices of the Peace (who were not legally trained) for summaries of law, procedures and forms supported a market for Justice of the Peace manuals in Mississippi,[27] as in many other states.

Attitudes about publishing decisions changed over time. At first there was dissatisfaction with the sufficiency of the court's written opinions, and the legislature in 1833 required the High Court of Errors and Appeals to issue a written opinion in every case "stating at large the reasons and principles upon which such decision is made" and further requiring every dissenting judge to "reduce his opinion to writing and the reasons therefor . . . . " The refusal to write such an opinion was made a misdemeanor and cause for removal from office.[28] In the 1840s, the legislature assumed the power to appoint reporters for the Court of High Errors and Appeals which had been previously selected by the court itself.[29] By 1850, the legislature apparently concluded that the published reports had become too long, and it directed the reporters to exclude arguments of counsel and to omit redundant opinions.[30] The authority to appoint reporters was later returned to the court, and the court was given responsibility for select-

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DICTION, WITH FORMS FOR PLEADINGS, NOT INCLUDING PARTITION, ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, AND A FEW OTHER SUCH SUBJECTS WHICH, BY STATUTE, HAVE THEIR OWN SEPARATE AND SPECIAL PROCEDURE (Bobbs-Merrill Co., 2d ed. 1950).

[27] *See, e.g.*, Volney Erskine Howard and Anderson Hutchinson, *A Manual for Clerks, Sheriffs & Justices of the Peace*, *reprinted in* MISS. CODE [HOWARD & HUTCHINSON'S CODE] app. at 794 (1840), discussed *infra* note 61.

[28] An Act to Establish and Organize the High Court of Errors and Appeals § 8, Jan. 1833 Miss. Laws 134-35; MISS. LAWS 1824-1838, at 442-43.

[29] *See supra* note 21.

[30] The reporter was directed to omit redundant opinions and not to report briefs and arguments of counsel, but the reporter was permitted to summarize the points counsel made. *See* Jan.-Mar. 1850 Miss. Laws ch. 41.

In their last volume, the outgoing reporters appointed by the court explained that they refused to be candidates for the position after the legislature assumed the power of appointment. They observed, "Complaint has been made of the amount of superfluous matter contained in these volumes. This we presume refers principally to the briefs of counsel." *Preface*, 22 Miss. at v-vi (1851).

ing its contents.[31]

The state law school was established in 1854.[32] In advertising the school, the first law professor, William F. Stearns, emphasized the value of studying the concrete laws of the state in which students intended to practice.[33] Nevertheless, the required textbooks until the end of the nineteenth century included general treatises and no works specific to Mississippi except for the state code and constitution.[34]

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[31] *Cf.* MISS. REV. CODE ch. 7, §§ 199, 259 (1880) (giving governor power to appoint officers and instructing law reporter to publish the decisions deemed important by judges on Supreme Court); MISS. REV. CODE ANN. ch. 115, §§ 3736, 3738 (1892) (giving court power to appoint reporters and instructed reporters to publish decisions deemed important by him or any judge on Supreme Court).

[32] In requesting the legislature to authorize the law school, the university trustees emphasized that legal education should be tied to education in the Humanities: "The university greatly needs a professorship of law; but not of law alone, in the opinion of the undersigned. The philosophy of government should be taught together with it, and history, which is philosophy teaching by example." Letter of J. Thompson of January 1854 *quoted in* EDWARD MAYES, HISTORY OF EDUCATION IN MISSISSIPPI 142 (1899). The urgent need for a state school of law at that time was bound up in the growing crisis over slavery. The trustees suggested that Mississippi students attending law schools outside the region might have been receiving education "antagonistic . . . to Southern views of the right philosophy of government, but we feel assured that a Southern university of learning could never disseminate views of society and government which would prove prejudicial to Southern interests." *Id.*

[33] Circular Letter from William F. Stearns to the Mississippi Bar (Oxford, Miss., 1858). The university's catalog repeated the advantages of study in law school over apprenticeship in a law office; it also emphasized the "inducements" for those planning to practice in Mississippi (including automatic licensure for practice in the state upon receipt of a Bachelor of Laws degree from the state law school) that "outweigh the attractions of any other Law School in the Union." CATALOGUE OF THE OFFICERS, ALUMNI AND STUDENTS OF THE UNIVERSITY OF MISSISSIPPI 1859-1860, at 28 (1859).

[34] Required textbooks in 1854-1855 were: Blackstone's Commentaries; Kent's Commentaries; Story on Bailments; Story on Agency; Story on Partnership; Story on Conflict of Laws; Smith on Contracts; Byles on Bills; Stephen on Pleading; Angell and Ames on Corporations; Greenleaf on Evidence; Adams' Equity; Greasley's Equity Evidence; and Wharton's American Criminal Law. *See* Mayes, *supra* note 32, at 144. In 1857, Bishop on Criminal Law was substituted for Wharton, and the Revised Code of 1857 was added to the list. *Id.* at 144; CATALOGUE OF THE OFFICERS, ALUMNI AND STUDENTS OF THE UNIVERSITY OF MISSISSIPPI 1859-1860, *supra* note 33, at 33.

The claim has been made that L.Q.C. Lamar substantially altered law school education during his tenure of slightly over two years after the Civil War. *See, e.g.*, Parham H. Williams, *Foreword*, THE EYE OF THE LAW 8-9 (1978) (exhibition

III. LEGAL SOURCES

A. Session Laws

From its first session in 1818, the state legislature's session laws were published regularly in official volumes, the contents of which were certified by the secretary of the state. (Appendix I contains a complete list of pre-1900 state session laws.[35]) The official printers for the session laws also published Senate and House Journals for the sessions.[36] Title

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catalog). This is not consistent with the published statements of Edward Mayes, who was Lamar's son-in-law. Mayes served both as dean of the law school and chancellor of the university. While the school prospered under Lamar, Mayes wrote pointedly that "Professor Lamar made no changes in the course of study." *See* Mayes, *supra* note 32, at 145.

Mayes himself introduced only minor changes to the required textbooks. He wrote that he established the following curriculum:

> Blackstone's Commentaries, Stephen on Pleading, first volume of Greenleaf's Evidence, Kent's Commentaries, Adams's Equity, Smith on Contracts, Addison on Torts (Harvard abridgment) . . . . In June, 1881, the two-year course was reestablished. The books used were then as follows: For the juniors, Blackstone's Commentaries (omitting fourth book [on criminal law]), Stephen on Pleading, first volume of Greenleaf's Evidence, second and third volumes of Kent's Commentaries, Bishop's Criminal law, Bishop's Criminal Procedure, Bishop on Contracts, and Bigelow on Torts; for the seniors, Adams's Equity, Bispham's Principles of Equity Jurisprudence, Barton's Suit in Equity, first volume of Kent's Commentaries, Desty's Federal Procedure, Constitution of the United States, constitution of Mississippi, Cooley's Constitutional Limitations, Pierce on Railroads, May on Insurance, Code of Mississippi, in the order named.
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> This course of reading has remained [as of 1899] in force, except that Broom's Commentaries on the Common Law have been substituted for Second and Third Kent, Contracts and Torts have been transferred to the seniors, Davis on International Law substituted for First Kent, Curtis's Lectures for Desty, and Tiedman on Real Property for May.

Id.

Mayes later published what was probably a summary of lectures on legal topics that he delivered as professor at the law school. EDWARD MAYES, RIBS OF THE LAW, BEING A SERIES OF CONCISE STATEMENTS OF THE OUTLINES FOR LEGAL STUDY FOR THE SERVICE OF LAW STUDENTS (1909). This work did not indicate much special interest in local law and occasionally imparted general legal principles at variance with local statutes. *Cf. id.* at 105 (providing common law definition of murder without reference to local statutory elements).

[35] For territorial session laws, see *supra* note 7.

[36] McMurtrie lists pre-statehood journals for 1803, 1806, 1812 and 1814.

pages for session laws vary, but the first seventeen sessions were identified by number. Thus the first volume of published state session laws is entitled *Acts Passed at the First Session of the First General Assembly of the State of Mississippi.*[37]

The eighteenth session passed no laws, and beginning with the laws passed by the January 1836 session, the volumes no longer identified the session by number. Instead, the volumes identify the dates the legislature sat and the status of the assembly, i.e., whether it was regular, adjourned or called. Thus the volume from 1836 is entitled *Laws of the State of Mississippi; Passed at a Regular Biennial Session of the Legislature, held at Jackson, in January & February, A.D. 1836.*[38] By the late 1870s, title pages indicated both starting and ending dates for the sessions.[39]

Determining which sessions published laws is an initial source of confusion. The titles are inconsistent and can be confusing. For example, the first and second volumes refer to acts passed at the "first session" of the first and second general assemblies. Yet there was no second session for either legis-

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MCMURTRIE, *supra* note 7, at 40-41, 49, 59, 66. Crandall lists journals for 1811, 1814, 1816 and 1817. O.H. CRANDALL, CATALOGUE OF THE MISSISSIPPI STATE LIBRARY 79 (Jackson, Miss., Miss. Pilot Office 1869) (copy on file with the State Library of Mississippi, Jackson, Miss.). It is almost certain that there were others, but it is less certain that all sessions produced journals. The fact that Davis published an unofficial account of at least one session, *see infra* note 211, strongly suggests that no official journal was published for that session.

[37] ACTS PASSED AT THE FIRST SESSION OF THE GENERAL ASSEMBLY OF THE STATE OF MISSISSIPPI (Natchez, Miss., Andrew Marschalk, State Printer 1818).

[38] LAWS OF THE STATE OF MISSISSIPPI; PASSED AT THE REGULAR SESSION OF THE LEGISLATURE HELD IN JACKSON IN JANUARY & FEBRUARY, A.D. 1836 (Jackson, Miss., Q.R. & J.S. Fall, State Printers 1837). The leaf following the title page contains the following:

> This is to certify, That the following printed acts and resolutions, passed at a regular session of the legislature of the state of Mississippi, in the year one thousand eight hundred and thirty-six, are just and true copies from the originals in my office. Given under my hand and seal of office, this 20th March, 1836.
> B.W. Benson, *Sec. of State*
> Jackson, Miss., March 20, 1836.

Id. The effect of such certification was to make the contents of the officially published session laws self-authenticating under the rules of evidence.

[39] *See* Jan.-Feb. 1877 Miss. Laws ("Commencing January 2d, 1877, and Ending February 1st, 1877").

lature. The pre-1836 volumes that identify sessions by sequential number do not identify their dates, and the publication date of the volume may not correspond with the starting or ending dates of the legislature. Thus the volume of laws passed at the first session, called October 1817, bears a publication date of 1818. Because the later volumes identify sessions by date and do not indicate their number, it is difficult for researchers and libraries to determine whether they have a complete set of session laws. A list of sessions is not a perfect guide because one session passed no legislation and thus published no session laws.[40]

The series of session laws has no official cumulative index.[41] Under different constitutions, regular meetings of the legislature occurred at different times. Moreover, there were also specially called sessions and adjourned sessions, whose acts were published in separate volumes of session laws.[42] As a result, for numerous calendar years (1832, 1835, 1845, 1849, 1851, 1869, 1879, 1881, 1883, 1885, 1887, 1889, 1891, 1893, 1895, 1899) there are no published volumes. But the fourth and fifth sessions both occurred in 1821, and the fifth session published two volumes in two different years, in 1821 and 1822.

In short, it is difficult to tell from any source whether the hard volumes on the shelf—or, indeed, the volumes reprinted on commercially available microform—comprise a complete set of session laws.[43] To help remedy this gap, a complete list for all state session laws from 1817 to 1900 is contained in the Appendix.

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[40] The microfiche published by W.S. Hein Company contain a blank fiche that alerts the user to the fact that the 1835 session passed no acts. This explains the absence of a numbered eighteenth session and probably explains why the legislature thereafter identified session laws by dates rather than by the number of the session.

[41] An unofficial index was later prepared. *See* RENA HUMPHREYS AND MAMIE OWEN, INDEX OF MISSISSIPPI SESSION ACTS 1817-1865 (Jackson, Miss., Tucker Prtg. House Publishers 1937). Though the compilers announced the preparation of a second volume, *Preface*, *id.* at 3, none appeared.

[42] While the sessions were still being numbered sequentially, the practice was apparently not to give a reconvened session following adjournment a new number. Thus the session laws of the fifth session appear in two calendar years, 1821 and 1822.

[43] For a reliable list of session laws, see 1 PIMSLEUR'S CHECKLISTS BASIC AMERICAN LEGAL PUBLICATIONS, *supra* note 7. The list of session laws in MATTIE

An additional source of confusion, aggravated by binding practices, is determining the appropriate date for session laws where the acts of session differ from the publication date of the volume or where they begin a new calendar year before the session ends. Three examples will illustrate the sources of possible confusion. First, publication dates were sometimes altered to correspond to the dates of the session.[44] Second, publication dates sometimes postdate the conclusion of the session.[45] Third, a session that began late in one calendar year was sometimes completed only in the following year.[46]

Though officially published for the state, the session laws

PLUNKETT, CATALOGUE OF THE MISSISSIPPI STATE LIBRARY 47-48 (Nashville, Brandon Prtg. Co. 1902), in THOMAS MCADORY OWEN, A BIBLIOGRAPHY OF MISSISSIPPI 740-48 (Washington, Gov't Prtg. Office 1900), and O.H. CRANDALL, *supra* note 36, at 77-78, are not complete. Owen's bibliography was apparently also printed in the *Report of the American Historical Association for 1899*. *See* OWEN, *supra* at 779.

[44] The session laws for the called session meeting October 1852 were published as LAWS OF THE STATE OF MISSISSIPPI, PASSED AT A CALLED SESSION OF THE MISSISSIPPI LEGISLATURE, HELD IN THE CITY OF JACKSON, OCTOBER, 1852 (Jackson, Miss., Palmer & Pickett, State Printers 1852 [i.e. 1853]). While the title page presents no apparent problem, the date of the printed certificate of January 1, 1853 on the following page reveals that the volume was predated to make the publication date correspond with the date of the session. This raises a problem for a citation system tied to publication dates. To avoid confusion, the actual publication date may be inserted in brackets as in the above citation. *See infra* note 51.

[45] The fifth session was convened in November 1821, but the first volume of its laws was not published until 1822. LAWS OF THE STATE OF MISSISSIPPI, PASSED AT THE FIFTH SESSION OF THE GENERAL ASSEMBLY, HELD IN THE TOWN OF COLUMBIA, PUBLISHED BY AUTHORITY (Columbia, Miss., P. Isher, State Printer 1822). The bindery labeled this volume "1822." Likewise, the work of the called session in November 1858 was completed in December 1858, but its laws were published in 1859. LAWS OF THE STATE OF MISSISSIPPI, PASSED AT A CALLED SESSION OF THE MISSISSIPPI LEGISLATURE, HELD IN THE CITY OF JACKSON, NOVEMBER, 1858 (Jackson, Miss., E. Barksdale, State Printer 1859). The bound volume at hand for the latter has a label "1858" pasted over the binding, presumably because the bindery originally labeled the volume 1859.

[46] For example, the work of the adjourned session reconvening in December 1856 did not end until February 1857. The session laws were published in 1857. LAWS OF THE STATE OF MISSISSIPPI, PASSED AT AN ADJOURNED SESSION OF THE MISSISSIPPI LEGISLATURE, HELD IN THE CITY OF JACKSON, DECEMBER, JANUARY, AND FEBRUARY 1856-1857 (Jackson, Miss., E. Barksdale, State Printer 1857).

were actually printed by numerous authorized printers. Over a half-dozen different printers issued session laws before the Civil War. The role of these printers in arranging materials, providing headings and introducing chapter numbers remains problematic. From the beginning, the session laws were rarely presented in strict chronological order. Private acts and resolutions were often printed last.[47] Acts were arranged partly by the type of act. For example, the January-February 1836 volume places together two acts passed on different days that related to the authorization for the establishment of the state penitentiary; likewise, acts incorporating private and public entities are grouped together. But this topical arrangement is inconsistent.[48] After 1839, each statute also received a separate "chapter" number.[49]

Given the changing format and title of session laws, the prescribed rule of *The Bluebook* has limited application.[50] Instead, this Article proposes a modification of that rule, under the general principles of *The Bluebook,* in order to identify precisely and consistently the source of a session law. Because sequential numbering was abandoned after 1834, and because the status of a session (regular, called or adjourned) does not affect the validity of its enactments, those facts need not be indicated. Instead, the volume should be identified by months and years for the session. When these conflict with the printed publication date of the volume, however, that date might be inserted in brackets to avoid any possible misunderstanding.[51]

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[47] In 1822, private acts were published in a separate volume of session laws.

[48] Volumes generally have both a table of contents and an index, with the table of contents printed at the end of the volume in the earliest volumes.

[49] Some earlier session laws (e.g., 1822 and 1828) employed chapter numbers, but this practice was not followed consistently until 1839. *See* Jan.-Feb. 1839 Miss. Laws ch. 1. From 1839 until 1856, chapter numbers were given in Arabic numerals. From 1857 until 1886, Roman numerals were used. After 1890, Arabic numerals were resumed. The citation format proposed in Appendix IV employs Arabic numerals for all years.

[50] For the form prescribed by *The Bluebook*, see *supra* note 2.

[51] This is consistent with other cataloguing and bibliographic practices. *See generally* 1 LIBRARY OF CONGRESS RULE INTERPRETATIONS 1.4F2:

> If a publication date is transcribed, e.g., from the prescribed source of in-

B. State Codes and Compiled Statutes

Official Revised Code of 1823 (Poindexter's Code). Mississippi's first official state code was authorized by the 1821 legislature. The act expressly provided for the revision and amendment of the state statutes by the sitting governor, George Poindexter.[52] The code's chapters generally comprised acts adopted by the new state legislature, and the code as a whole was adopted and became effective in 1823 or 1824.[53]

Official Supplement of 1838.[54] In 1838 the state published a one-volume, official statutory compilation of public acts enacted since the publication of the Code of 1823.[55] The

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> formation, and the item also contains a later date that represents the date the item was *first* manufactured, use the date of manufacture as the basis for inferring the true publication date (an item cannot be published until after it is manufactured). Such inferences must be bracketed . . . .

Id. See also ANGLO-AMERICAN CATALOGUING RULES Rule 1.4F2 at 1-27 (2d ed. 2002) ("Give the date as found in the item even if it is known to be incorrect. If a date is known to be incorrect, add the correct date."). Both of these sources require that the correct date be prefaced by "i.e." and inserted in brackets.

[52] Act of February 12, 1821, REV. CODE MISS. [POINDEXTER'S CODE] ch. 1, § 1 (1823) (authorizing revision and consolidation of state statutes). The code was printed in 1824 by Francis Baker in Natchez. Judge R.H. Thompson provides an extended discussion of the background of the adoption of this code and remarks that it was "commonly called 'Poindexter's Code'; sometimes designated as the Code of 1823." THOMPSON, *supra* note 14, at 10. Critics of its harsh penal laws later called it the "Bloody Code." *See* Sansing, *supra* note 10, at 6-7.

The code effected a complete revision: prior acts not included in it were repealed. REV. CODE MISS. [POINDEXTER'S CODE] ch. 4, § 8 (1823).

[53] REV. CODE MISS. [POINDEXTER'S CODE] ch. 4, § 8 (1823). The code was actually published in 1824. *See supra* note 52.

[54] The legislature had authorized a new revised code on December 25, 1833; MISS. LAWS 1824-1838, at 525-26. *See generally* THOMPSON, *supra* note 14, at 11:

> Judge Pray [the authorized reviser] practiced his profession extensively in the courts of Louisiana. He became infatuated with the civil law and in preparing his revision of the statutes of this state he incorporated into his work so many features of the civil law that its adoption would have revolutionized our jurisprudence. The legislature was hostile to his views, its members having the common law conceptions of laws and government bred in their bones. His proposed code was most unceremoniously rejected. The legislature did not substitute any thing [sic] for it.

Id.

[55] The full title was LAWS OF THE STATE OF MISSISSIPPI, EMBRACING ALL ACTS OF A PUBLIC NATURE FROM JANUARY SESSION, 1824, TO JANUARY SESSION 1838:

volume was designed to reprint in one place the general and public laws available in session laws, but it was not a revision of the laws and did not supplant or modify any prior law.

Unofficial Compilation of 1839. Statutory research remained unwieldy even after the publication of the one-volume compilation of laws postdating the Code of 1823. Many laws still in the books had become modified or even repealed by successive statutes that were scattered throughout the supplement and that were not printed adjacent to the original statute. Accordingly, in 1839 two writers[56] privately published an unofficial code or "digest" of all the state's laws.[57] Their preface explained that the work contained the Code of 1823, "and

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PUBLISHED BY AUTHORITY. The title page stated: "Jackson: Printed for the State of Mississippi, 1838." Though the verso identified John D. Toy in Baltimore as printer, he was not the authorized printer for the session laws for 1838.

The title and format for this volume are confusingly similar to the titles of session laws. Most copies of it in the law library were bound in a manner indistinguishable from the session laws and were indeed shelved with the session laws. The compiler, Pray, may have included the authority to compile the laws because it mentioned him by name, *see* Act of Dec. 25, 1833, in MISS. LAWS 1824-1838, at 525-36, but he omitted the final approval and authorization to print the laws. Thompson could find no authorization for its official publication. THOMPSON, *supra* note 14, at 12 ("A careful search for previous legislative provision for the publication of the volume has been made without finding it. Possibly the legislative authority was never published in print. There are instances of legislative acts of this state being, by inadvertence perhaps, omitted from the printed laws."). Thompson could have found the authorization in the session laws. *See* Act to Provide for the Re-Printing and Publishing of Certain Laws of This State § 1, 1837 Miss. Laws 20 (authorizing reprint of all general laws since revised code of 1823); Act of Feb. 5, 1839, 1839 Miss. Laws 26 (directing payment for reprint to governor and not George R. Fall), as referred to by Hutchinson, in MISS. CODE [HUTCHINSON'S CODE] ch. 2, art. 6, § 3, at 67 (1848). (George R. Fall had been the official printer of the session laws from 1834 to 1837.)

[56] The digest's compilers were T.J. Fox Alden and J.A. Van Hoesen. The little that is known about Van Hoesen is contained in THOMPSON, *supra* note 14, at 13 (observing that Van Hoesen filled unexpired term as State Treasurer in 1838 and represented state in acquiring title to land on which University is located). Fox Alden was admitted to practice in Crawford County, Pennsylvania between 1821 and 1830. *See* D.M. Farrelly, A History of the Bar of Crawford County, *available at* http://www.homealltel.net/Yoset/CCo/history/1888/Bar.html (article from 1888 *Tribune-Republican*). His office was damaged in the Pittsburgh fire of 1845. *See* Downtown: The Great Fire *available at* http://www.clpgh.org/exhibit/neighborhoods/downtown/down_n10b.html.

[57] DIG. LAWS MISS. (Fox Alden & Van Hoesen). The single volume digest was published by Alexander S. Gould, New York.

attached to each chapter the various acts with the date of their approval, altering, amending, enlarging, or repealing [provisions of the original code] . . . . By this arrangement, you have at a glance the old law, the mischief and the remedy, a circumstance, to the enlightened legislator and professional gentleman, of no small moment."[58] The unofficial compilation of 1839 provided a useful compendium and was indexed better than the Code of 1823.[59] The compilers adopted an alphabetical arrangement of major topics.[60] Unfortunately, while providing new chapter numbers consistent with their reorganization of the material, the compilers did not preserve the official code chapter numbers, thus preventing any citation to the official source of state law.

Semi-Official Compilation of 1840 (Howard and Hutchinson's Code). The lack of a reliable compendium of laws in force also led the reporter for the High Court of Errors and Appeals, Volney E. Howard and A. Hutchinson, to publish an unofficial code in 1840.[61] The title page of their compendium of statutes (which also included acts of Congress and a manual for clerks, sheriffs and justices of the peace) claims that it was published "By Authority," yet the first statutory reference to their work appears only in an appropriations act in February 22, 1840.[62] That Act did not authorize them to compile or publish, let alone revise, the statutes. Their volume was presumably already published, for the act referred to it as an accomplished fact and authorized the purchase of fifteen hundred copies at not more than eight dollars per volume. The act also requested the justices on the High Court of Errors and Appeals to examine the digest and to certify that it was "an authentic compilation of the statutes of this state."[63] This language did not technically convert the privately prepared volume into an official code but did authenticate the contents of the code, i.e., make them admissible as evidence without additional authentication. It is unknown whether the certificate was issued, but the court's opinions (as reported by one of the compendium's compilers) began to cite the compendium, indicating that it was at least a semi-official source of law.[64]

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[58] *Preface*, *id.* at n.p.

[59] THOMPSON, *supra* note 14, at 13.

[60] The alphabetical order is apparent from the sequence of major topics and the arrangement may have derived from some other state's code available to them.

[61] THE STATUTES OF THE STATE OF MISSISSIPPI OF A PUBLIC AND GENERAL NATURE WITH THE CONSTITUTIONS OF THE UNITED STATES AND OF THIS STATE: AND AN APPENDIX CONTAINING ACTS OF CONGRESS AFFECTING LAND TITLES, NATURALIZATION, &C. AND A MANUAL FOR CLERKS, SHERIFFS AND JUSTICES OF THE PEACE (V.E. Howard & A. Hutchinson 1840) [hereinafter MISS. CODE [HOWARD & HUTCHINSON'S CODE] (1840)]. The intention of the work was to "furnish a methodical and perfect digest of the statutes in force as well as those needed for reference in the courts, so as to render unnecessary either a revision or a reprint of the statutes of large." *Preface*, *id.* at vi.

[62] 1840 Laws ch. 144, art. 59, at 248.

The volume preserved most[65] extant laws but omitted their titles and enacting clauses. Entitled *The Statutes of the State of Mississippi* and referred to by contemporaries as a "digest," the work was a true code in that it attempted to compile and reorganize the existing body of law into a coherent whole. Material was organized into approximately one dozen broad topics that corresponded generally to topics in *Blackstone's Commentaries*.[66] This arrangement was also adopted by the next two codes.[67]

Official Code of 1848 (Hutchinson's Code). The 1848 code was not a revision of the law[68] but attempted to place all valid general laws together with summaries of many older statutes no longer in force into the Blackstonian scheme of the 1840 compilation. The legislature authorized the purchase of this code upon approval by its judiciary committee, and when the committee approved the new code it became an official substitute for the previous official reprint of 1838.[69]

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[63] THOMPSON, *supra* note 14, at 14 (quoting appropriations act of 1840).

[64] *See, e.g.*, Rankin v. Sanders, 7 Miss. (6 Howard) 52, 58 (1841) (citing "Hut. and Howard, 373, sec. 12").

[65] Hutchinson later published a severe criticism of his collaborative compilation, referring both to the "haste of its preparation" and its omission of "several important acts" due to the compilers' mistaken reliance on the assumption that the Revised Code of 1823 and the supplement of 1838 included all laws in force. *See* MISS. CODE [HUTCHINSON'S CODE] ch. 2, art. 7 (1848) (compiler's summary of prior digest).

[66] The volume commenced with the federal and state constitutions and then followed a topical scheme (partly set forth in an Analytic Index), which ranged from statutes defining the organization and boundaries of the state to the Penitentiary Code. *See* MISS. CODE [HOWARD AND HUTCHINSON'S CODE] chs. 1, 50 (1840). The topical arrangement was preserved by Hutchinson's Code of 1848, which expressly acknowledged *Blackstone* as a model, MISS. CODE [HUTCHINSON'S CODE] *Preface* 6 (1848) ("The Plan adopted and pursued is in close conformity to the lucid Analysis of Blackstone's Commentaries; and this fact is thus stated to anticipate the cavils of those whose arrogance might not otherwise be rebuked."). The topical scheme of arrangement is more readily apparent in the 1848 code. *See id.* at 9-12.

[67] *See* Appendix II.

Official Revised Code of 1857. In 1854, the legislature proposed a complete new revision of the code and authorized the justices of the High Court of Errors and Appeals to appoint three commissioners "to revise, digest, and codify the laws of this state, and to propose such alterations or amendments thereof, and such new laws, as they might deem expedient."[70] The resulting Mississippi revised code of 1857 radically altered the presentation of laws. Statutes were arranged by topic, and the general Blackstonian arrangement was preserved in part. Within the criminal code, however, the topical arrangement was abandoned for alphabetical order. Some of the chapters were subdivided into articles while others were subdivided into sections.[71]

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[68] Hutchinson was not himself authorized to draft the code in advance and took pains to explain that it was "not a Revision," MISS. CODE [HUTCHINSON'S CODE] at 6 (1848), and to attack the idea of revised codes as undemocratic:

> A revision, by one person, or even by a delegated committee, however capable and patriotic, in this age and country, must be a questionable undertaking. It is for the People, by their Senators and Representatives, admonished and restrained as they are by a plain and permanent written Constitution, to enact, change, or abrogate Statutes, as experience may prompt.

Id. But he also rejected the idea of including only the laws in force. *Id.* at 7-8.

[69] MISS. CODE [HUTCHINSON'S CODE] ch. 2, art 8, § 1 (1848). The code was to become effective only after the most recent session's laws were added and the text finally approved by a commission appointed by the governor. Thompson surmises that such a commission must have met resulting in the governor's certificate from the fact that "it is well known that the Code was promptly recognized as being in force." THOMPSON, *supra* note 14, at 15. The commission and governor's certificate were in fact reprinted in the code. MISS. CODE [HUTCHINSON'S CODE] ch. 2, art. 8, § 6 at 69 (1848).

[70] Act of Mar. 1, 1854, ch. 50, Jan.-Mar. 1854 Miss. Laws 154-55 (providing for new code). For more information about the historical background of this legislation, see *Introduction*, MISS. REV. CODE (1857). The commissioners were William L. Sharkey, William L. Harris and Henry T. Ellett. *See generally* THOMPSON, *supra* note 14, at 16-18.

As Thompson emphasizes, the finished code contained neither marginal case annotations nor a manual of forms as originally directed by the legislature, *id.* at 17. The code was approved and became effective in 1857. *See* MISS. REV. CODE ch. 1, art. 2 (1857).

Official Revised Code of 1871.[72] The legislature authorized a new revised code in 1870.[73] The code was adopted and became effective in 1871.[74] The speed with which it was drafted and enacted may explain the general lack of organization. Chapters (comprising separate topics) were considered and approved separately. Some of the prior codes' arrangement was retained, but new materials were inserted arbitrarily.[75]

The chapters were divided into articles and subdivided into sections, but all sections were numbered sequentially up to section 2938. It was the first Mississippi code to adopt consecutive numbering for sections.[76] The code was unpopular for political reasons.[77]

Official Revised Code of 1880. Seven years after the effective date of the code of 1871, the legislature authorized a new code.[78] The preamble to the authorizing legislation referred to "an urgent necessity for a revision and codification of the laws of this state" and to the fact that Judge J.A.P. Campbell[79] of the Supreme Court—who had been one of the 1871 code commissioners—"expressed a willingness to perform this work."[80] This code was the first in which the commissioners complied with the legislature's requirement that the code contain references to decisions of the Supreme Court.[81] It was adopted and became effective in 1880.[82] Like the 1871 code, the 1880 code purported to take the existing statutes as its basis—"no change was made merely for the sake of change."[83] But it arranged the material more consistently according to its organizational scheme.[84] Like the 1871 code, it ascribed consecutively numbered chapters and sections to the laws.

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[71] *E.g.*, MISS. REV. CODE ch. 10, art. 1 (1857); MISS. REV. CODE ch. 11, § 1 (1857).

[72] A commission appointed in 1865 to revise the laws at the end of the Civil War was dissolved without ever acting. *See* THOMPSON, *supra* note 14, at 18-19.

[73] 1870 Miss. Laws 624.

[74] MISS. REV. CODE ch. 1 (1871).

[75] For example, chapter 64 (creating Alcorn University) is inserted between chapters 63 (handling baggage on railroads) and 65 (compromise of debts to counties).

[76] The commissioners were also supposed to annotate the code with court decisions but never did so. *See* THOMPSON, *supra* note 14, at 20.

[77] Although two of the three code commissioners were local lawyers who achieved prominence after Reconstruction, the code was evidently viewed with hostility because it was enacted during Reconstruction. Thompson observes, "The Code of 1871 did not prove satisfactory to the bench and bar of the state, although it would be difficult to point out a convincing reason why it did not meet approval; probably the dominant reason was the fact that it was enacted by a carpetbag legislature." THOMPSON, *supra* note 14, at 21.

[78] 1878 Miss. Laws 202.

[79] Justices of the Mississippi Supreme Court were titled "judge" at that time.

The 1880 code modernized the law by emancipating married women from the disability of coverture, eliminating dower and curtesy, converting most joint tenancies and tenancies by the entirety into tenancies in common, empowering creditors to set aside fraudulent conveyances and abolishing private seals and distinctions between sealed and unsealed writings.[85]

Official Revised Annotated Code of 1892. The new Mississippi Constitution of 1890 required the governor to appoint three commissioners to "prepare and draft such general laws as are contemplated in this constitution, and such other laws as shall be necessary and proper to put into operation the provisions thereof and as may be appropriate to conform the general statutes of the state to the Constitution."[86] But the commissioners did not limit themselves to proposing new laws conforming to the new constitution. They proposed a complete revision and a thorough annotation of the code.[87]

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[80] 1878 Miss. Laws 202.

[81] *See supra* notes 70, 76. The Code of 1880 included few references, and they consisted of citations to the reporter and page. They did not identify the case name or year and provided no discursive annotation. The commissioner confessed he was "perplexed about references to decisions, as applicable to some of the sections." *Introduction*, *id.* at 3.

[82] MISS. REV. CODE at 43 (1880). The act adopting the code is placed before material that is given chapter numbers.

[83] *Id.* at 3.

[84] For example the legislation creating Alcorn College was placed together with the acts pertaining to other state universities. *Compare* MISS. REV. CODE ch. 19, § 776 (1880), *and* MISS. REV. CODE ch. 64, § 2914 (1871).

[85] Thompson identifies these changes. *See* Thompson *supra* note 14, at 22-23.

[86] MISS. CONST. § 278.

The legislature accepted the work of the commissioners and the code effected a revision of existing laws[88] and included extensive annotations to state decisions.[89] The entire code was reorganized under an alphabetical plan. Thus the chapter "Governor" fell between the chapters "Garnishment" and "Guardian and Ward."[90]

The commissioners also directed attention to the language employed. They complained about the sloppy, uneven and verbose language that had been employed in prior codes,[91] and they adopted a plain English approach to code drafting. The commissioners announced, "They wholly abandoned what they deemed to be useless verbiage, and hope that they have succeeded in presenting the result of their labors in good, every-day English, that will not be found to be repulsive to the citizen or hard to comprehend."[92] Their attention to simple language expressed their populist conviction that the code should be accessible to the nonspecialist.[93]

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[87] The commissioners explained, "The commissioners met . . . and, after a thorough consideration of the condition of our statutory laws, concluded that their work would be unsatisfactory and unworthy if they should fall short of preparing and presenting an entire revision of the general statutes of the state." MISS. REV. CODE ANN., *Prefatory* iii (1892). The full title of their work was: *The Annotated Code of the General Statute Laws of the State of Mississippi Prepared by R.H. Thompson, George G. Dillard, and R.B. Campbell and Reported to and Amended and Adopted by the Legislature at its Regular Session in 1892: Published by Authority of the Legislature*. It was published by Marshall & Bruce, Law Publishers in Nashville. *Id.* at i.

[88] *Id.* ch. 1, § 3.

[89] *See generally id.* For example, the annotation on actionable words contains considerably more text than the statute. *Id.* ch. 2. Annotations included short summaries of the holdings, case names and reporter citations.

[90] *Id.* chs. 55-57. The commissioners justified the alphabetical approach. *Prefatory*, *Id.* at iv.

[91] *Prefatory, Id.* at iii-iv.

> An examination of the previous revisions of our statutes showed that the attention of the learned gentlemen who prepared them was almost wholly directed to subject-matters rather than to the language of our written laws. Our statutes have been written by the hundreds of men—the learned and the unlearned, the sententious and the verbose—who have been members of the legislature. In many instances, too, they have been written under the most unfavorable circumstances. One man's composition is frequently injected into another's, wholly different in style, presumably by way of amendment, while statutes have been copied with variations from every quarter. The result of all this is painfully manifest on our statute books. The jargon of the law, the "saids," the "suches" and "aforesaids," the "provisos" and "provided furthers," the verbosity, the endless tautology, the involution of case within case and parenthesis within parenthesis, have engendered in the minds of many people an idea that multiplied efforts at certainty are essential, and that statutes have to be written in a different language from ordinary composition. Our books abound in instances where strained efforts at certainty have produced great uncertainty.

The code introduced uniformity and consistency into citation, too, by directing how session laws and reporters should be labeled.[94] Like the codes of 1871 and 1880, it was organized by chapters, but the laws were numbered sequentially.[95]

C. State Constitutions

Mississippi adopted new state constitutions in 1817, 1832, 1869 and 1890.[96] A constitutional convention was convened in

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Id.

[92] MISS. REV. CODE ANN., *Prefatory* iv (1892).

[93] Judge R.H. Thompson (one of the commissioners) explained, "[The commissioners] were impressed with the fact that a code is for the use of the people, for the average rather than the professional man . . ." THOMPSON, *supra* note 14, at 24. For a similar motive, the code eschewed Roman numerals. *Id.* at 27.

[94] MISS. REV CODE ANN. chs. 107 & 115 (1892). It required them to be labeled "Laws of Mississippi" and to designate their year and whether they were enacted at a regular, special or extraordinary session. *Id.* ch. 107, § 3310. It directed that *Mississippi Reports* be labeled and numbered sequentially as was already the practice. *Id.* ch. 115, § 3739.

[95] *See generally id.*

[96] The original text of the constitutions without amendments has been republished, THE CONSTITUTIONS OF MISSISSIPPI AS ORIGINALLY ADOPTED (1982) (published by Bureau of Governmental Research, the University of Mississippi).

In addition to general political histories of the state, notably, A HISTORY OF MISSISSIPPI (Richard A. McLemore ed., 1973) (2 vols.), there are a number of works that provide an overview of changes in the constitutions. John Ray Skates maintains a web page with a summary of the constitutions and on-line access to the text of each constitution. *Constitutions of Mississippi*, Miss. Hist. Now, *available at* http://mshistory.K12.ms.us/features/features3/constofms.html (online pub. of Miss. Hist. Soc.). *See generally* A CONTEMPORARY ANALYSIS OF MISSISSIPPI'S CONSTITUTIONAL GOVERNMENT: PROCEEDINGS OF A FORUM (Dana B. Brammer & John W. Winkle, III eds., 1986); GEORGE H. ETHRIDGE, MISSISSIPPI CONSTITUTIONS (1928); UNDERSTANDING MISSISSIPPI'S CONSTITUTIONS: AN HISTORICAL PERSPECTIVE (Barbara Carpenter ed., 1989); YESTERDAY'S CONSTITUTION TODAY: AN ANALYSIS

1851 but did not produce a new constitution,[97] and a new constitution was drafted in 1865 but failed to be ratified by the popular vote.

Mississippi Constitution of 1817. Bills authorizing the people of the Mississippi Territory to adopt a constitution and form a state appeared as early as 1812.[98] The Enabling Act was approved March 1, 1817,[99] and the new state was admitted December 10, 1817—as a slave state.[100]

The first constitution's architect and chief drafter was George Poindexter, who had served as territorial judge.[101]

OF THE MISSISSIPPI CONSTITUTION OF 1890 (Edward H. Hobbs ed., 1960); Sansing, *supra* note 10, at 3-17; Winbourne M. Drake, Constitutional Development in Mississippi 1817-1865 (1954) (unpublished Ph.D. dissertation, University of North Carolina); Steven A. Patterson, Mississippi's Four Constitutions: A Study of Political Response to Societal Change (1974) (unpublished M.A. thesis, University of Mississippi) (on file with the University of Mississippi, J.D. Williams Library).

[97] JOURNAL OF THE CONVENTION OF THE STATE OF MISSISSIPPI AND THE ACT CALLING THE SAME (1851). For the history of this convention, see *infra* note 125.

[98] *See* Report of the [Senate] Committee to Whom was Referred from the House the Bill to Enable the People of the Mississippi Territory to Form a Constitution and State Government (Apr. 17, 1812), *microformed on* Early American Imprints, 2d series, no. 27332 (Readex Microprint 1979).

[99] For the text of the act, see ETHRIDGE, *supra* note 96, at 484-86. This act limited the franchise for the state convention to certain "free white male" citizens in the Territory. *Id.* at 485. It also required the constitutional government to be "republican" and "not repugnant to the principles of the ordinance of the [Northwest Territory] *so far as the same has been extended to the said territory* . . . . " *Id.* at 485 (emphasis added). The text in italics comprised an elliptical reference to the permission of slavery in the Mississippi Territory.

[100] The journal of the convention has been published. *See The Journal of the Constitutional Convention of 1817*, 29 J. MISS. HIST. 443-504 (1967). *See also* JOURNAL OF THE CONVENTION OF THE WESTERN PART OF THE MISSISSIPPI TERRITORY: BEGAN (SIC) AND HELD AT THE TOWN OF WASHINGTON (Port-Gibson, Benj. F. Stockton 1831) (reprint ed. for convention of 1832). The resulting constitution was forwarded to and read in the House in early December 1817. Letter from His Excellency David Holmes, governor of the state of Mississippi, transmitting a copy of the constitution and form of government of the said state (1817). For the text of the act of Congress admitting the state, see ETHRIDGE, *supra* note 96, at 487.

For the history of the first state constitution, see Winbourne M. Drake, *The Framing of Mississippi's First Constitution*, 29 J. MISS. HIST. 301-27 (1967); Winbourne M. Drake, *Mississippi's First Constitutional Convention*, 18 J. MISS. HIST. 79-110 (1956). An unofficial version was printed and distributed by Andrew Marschalk. *See* JOHN TAYLOR, THE MISSISSIPPI AND LOUISIANA ALMANAC FOR THE YEAR OF OUR LORD [1818] 1 (1817-1818), *microformed on* Early American Imprints, 2d series, no. 41458 (Readex Microprint 1981).

[101] *See generally* EDWIN ARTHUR MILES, JACKSONIAN DEMOCRACY IN MISSISSIPPI

The constitution borrowed heavily from other state constitutions[102] and established the general form of government that would be followed by all subsequent constitutions—tripartite organization of state government, a popularly elected governor; bicameral legislature with impeachment powers and a court system with the legislature empowered to create lower courts.[103] The first constitution expressed the political elitism of its drafters, opting for limited government and restrictive voting requirements.[104]

Mississippi Constitution of 1832. The 1817 constitution could be amended only by means of a constitutional convention called by two-thirds of the legislature.[105] Growing political dissatisfaction with the constitution prompted the legislature to call a convention in 1830.[106] Voters ratified the call by a four-to-one margin, and legislation authorized the election of delegates, who met late in 1832.[107] The proceedings of the convention were published.[108] The constitution was

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33-37 (1961); MACK SWEARINGEN, THE EARLY LIFE OF GEORGE POINDEXTER: A STORY OF THE FIRST SOUTHWEST 146, 155 (1934) (discussing 1817 constitution).

[102] *See* WINKLE, *supra* note 10, at 2 ("Adapted, if not borrowed verbatim, from other frontier constitutions such as those of Kentucky and Tennessee, the Mississippi version offered few, if any, distinctive features among its six articles"). The constitution also borrowed from constitutions of the original states. *See* Hoffheimer, *Mississippi Courts: 1790-1868*, *supra* note 1, at 117 n.73 (identifying source of impeachment article in South Carolina Constitution of 1790).

[103] Hoffheimer, *Mississippi Courts: 1790-1868*, *supra* note 1, at 116-18. The constitution carried over the territorial practice of the legislature creating the court system and electing judges. The constitution itself established only a Supreme Court and gave the legislature the job of establishing "superior and inferior courts of law and equity." MISS. CONST. of 1817, art. V, § 1. This language, too, was taken from the South Carolina state constitution. *See* Hoffheimer, *Mississippi Courts: 1790-1868*, *supra* note 1, at 117-18.

[104] *See generally* Sansing, *supra* note 10, at 6-7 (summarizing leading features of 1817 constitution).

[105] MISS. CONST. of 1817, *Mode of Revising the Constitution*, § 1.

[106] Winbourne Magruder Drake, *The Mississippi Constitutional Convention of 1832*, 23 J. S. HIST. 354, 356 (1957). Drake discusses the history of the growing dissatisfaction with the constitution and points out that resolutions calling for a constitutional convention were introduced at every session of the legislature from 1825 to 1830 until finally getting the necessary two-thirds approval. *Id.*

[107] Act for Holding a Convention in this State, Dec. 1831 Miss. Laws 99-103; MISS. LAWS 1824-1838, at 375-78 (1838).

[108] JOURNAL OF THE CONVENTION OF THE STATE OF MISSISSIPPI, HELD IN THE TOWN OF JACKSON (1832).

adopted by the convention without being submitted to the voters at the general election.[109]

Historians have emphasized the impact of Jacksonian populist values on the drafting of the new constitution, especially the broad franchise for white males,[110] but the new constitution was not understood as a radical break. Officially titled "Revised Constitution," it preserved the general structure of state government, followed the format of the 1817 constitution and incorporated large parts of the language of the 1817 constitution.[111]

Under the new constitution, the legislature met biannually rather than annually.[112] The constitution provided an easier method for amending itself: an amendment could be adopted when passed by two-thirds of the legislature and then approved by a majority of the voters in the general election.[113] The constitution would eventually be amended in this way a number of times[114]—once in 1846,[115] once in 1852,[116] three times in 1856,[117] once in 1857,[118] several times in 1861[119] and twice in 1865.[120]

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[109] Drake, *Mississippi Constitutional Convention of 1832*, *supra* note 106, at 366. Drake discusses the controversy surrounding the method of adopting the constitution. *Id.*

[110] *See generally id.* at 368 ("The constitution was recognized by contemporaries, as well as by historians of a later day, as being the most democratic in the entire South, or, as far as political democracy for whites was concerned, in the entire Union."). *See also* MILES, *supra* note 101, at 33; WINKLE, *supra* note 10, at 6; Sansing, *supra* note 10, at 7-8.

[111] Hoffheimer, *Mississippi Courts: 1790-1868*, *supra* note 1, at 139. Some of the biggest changes were those that affected the court system. *See id.* at 139-62. The new constitution moved the article on the judicial branch before that on the executive, perhaps signalling a demotion of the prestige of the executive. MISS. CONST. of 1832, arts. IV & V. It eliminated the office of lieutenant governor, required the governor to live in the state capital and limited the governor to two-year terms in a six-year period. *See* Sansing, *supra* note 10, at 7-8.

[112] MISS. CONST. of 1832, art. III, § 30.

[113] MISS. CONST. of 1832, Mode of Revising the Constitution.

[114] All the amendments were published in full after the text of the original constitution (except for the wartime substitution of "Confederate" for "United" which was executed throughout the body of the document published in wartime session laws). Even those amendments that called for the alteration of language within the body of the constitution were separately printed after the text. Most, but not all, official texts of the constitution ascribed numbers to these amendments.

[115] MISS. CONST. of 1832, amend. I (delegating to legislature power to regulate slave trade); Resolution of Feb. 2, 1846, Jan.-Mar. 1846 Miss. Laws ch. 288.

The 1832 constitution altered the court system. It limited the legislature's power to create courts,[121] and itself created six courts—the High Court of Errors and Appeals (formerly called the Supreme Court),[122] circuit courts, a superior court of chancery under a single chancellor, probate courts, boards of police and justices of the peace.[123] The chancery court

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The effort to give the legislature the power to regulate the importation of slaves had begun immediately after the adoption of the new constitution. *See* Act of March 2, 1833, Jan.-Mar. 1833 Miss. Laws ch. 88 (delegating to legislature power to regulate slave trade). This was not approved by popular vote. *See generally* MISS. CONST. of 1832, amendments, *in* MISS. CODE [HUTCHINSON'S CODE] (1848) (listing proposed amendments that were not approved). Other amendments proposed by the legislature that were adopted by popular vote and did not become part of the constitution included an 1839 proposal to give circuit courts equity jurisdiction concurrent with the chancery courts, *see infra* note 124; an 1844 proposal to allow elections for state-wide and congressional candidates separate from other officers; and an 1846 proposal to prohibit charters to bank corporations. *Id.* Also unsuccessful was a proposed amendment to prohibit any suits against the state. Act of March 11, 1856, Jan.-Mar. 1856 Miss. Laws ch. 11 (adopting amendment prohibiting suits against state).

For the numbering of the constitutional amendments, see *supra* note 114.

[116] MISS. CONST. of 1832, amend. II (amending section 20 of constitution and creating boards of police with jurisdiction over county matters); Act of March. 12, 1852, Jan.-Mar. 1852 Miss. Laws ch. 61.

[117] MISS. CONST. of 1832, amend. V (eliminating chancery courts and transferring equity jurisdiction to Circuit Courts); Act of Feb 6, 1856, Jan.-Mar. 1856 Miss. Laws ch. 2; MISS. CONST. of 1832, amend. IV (changing legislative term of office to end in January), Act of Feb. 6, 1856, Jan.-Mar. 1856 Miss. Laws ch. 1; MISS. CONST. of 1832, amend III (providing for biennial elections in October instead of November); Act of Feb. 2, 1856, Jan.-Mar. 1856 Miss. Laws ch. 4.

[118] MISS. CONST. of 1832, amend. VI (altering legislative terms to expire at next general election at which successors elected), Act of Nov. 19, 1857, Nov. 1857 Miss. Laws ch. 94.

[119] *See infra* note 127.

[120] *See infra* note 123.

[121] The 1817 constitution had given the legislature the power to create "superior and inferior" courts, *see supra* note 103, but the 1832 constitution gave the legislature the power to create only "inferior" courts. MISS. CONST. of 1832, art. IV, § 24. *See generally* Hoffheimer, *Mississippi Courts: 1790-1868*, *supra* note 1, at 139-40.

[122] The new name emphasized the fact that the jurisdiction of the High Court of Errors and Appeal was limited to appeals. *See* Hoffheimer, *Mississippi Courts: 1790-1868*, *supra* note 1, at 140.

[123] *See id.* at 138-62. The legislature created other courts. *See generally id.*

proved unpopular and was eliminated by constitutional amendment in 1857.[124]

Civil War and After. In 1860 the Mississippi legislature declared in favor of secession, specifically identifying its fear of northern interference with slave owners' rights.[125] In 1861 the legislature ratified the confederate constitution.[126] Minor changes to the text of the state constitution were made in 1861 to make it comport with the state's affiliation with the confederacy.[127]

The freeing of over four hundred thousand slaves during[128] and after the Civil War[129] and the recognition of the citizenship rights of freed slaves[130] required changes to the state constitution. In 1865, provisional governor William L. Sharkey ordered a constitutional convention. Although African Americans were excluded from this convention, it nevertheless amended the Constitution of 1832 to acknowledge that "neither slavery nor involuntary servitude . . . shall hereafter exist in this state . . . ."[131]

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[124] *See* MISS. CONST. of 1832, amend. III. An amendment was proposed in 1839 that would have given full concurrent jurisdiction to the circuit courts, but it failed to obtain the necessary popular vote. *Cf.* Act of Feb. 15, 1839, Jan. 1839 Miss. Laws 97. For the history of chancery jurisdiction under the Constitution of 1832, see Hoffheimer, *Mississippi Courts: 1790-1868*, *supra* note 1, at 148-53.

[125] Resolutions of the Legislature of the State of Mississippi Declaring Secession to be the Proper Remedy for the Southern States, Feb. 1860 Miss. Laws 566.

A constitutional convention had been called following the federal crisis of 1850. The state convention in 1851 had reasserted Mississippi's commitment to the union and granted that the right to secession was "unsanctioned by the Federal Constitution." *Preamble and Resolutions as Adopted by the Convention*, *in* JOURNAL OF THE CONVENTION OF THE STATE OF MISSISSIPPI AND THE ACT CALLING THE SAME, at 47 (Jackson, Miss., Thomas Palmer 1851). But the resolution identified seven grounds that would justify secession. *Id.* Each ground specifically related to federal interference with the rights of slaveholders. *Id.*

[126] *An Ordinance to Adopt and Ratify the Constitution* § 1, *in* JOURNAL OF THE STATE CONVENTION AND ORDINANCES AND RESOLUTIONS ADOPTED IN MARCH, at 77 (Jackson, Miss., E. Barksdale, State Printer 1861).

[127] Ordinance of January 26, 1861, ch. 8, Jan. 1861 Miss. Laws 136 (striking the word "United States" from state constitution). *See generally* July 1861 Miss. Laws ch. 2 §§ 1-13 (substituting "Confederate States" throughout constitution). The text of the state constitution published with the July 1861 session laws incorporated these changes. This Secession Ordinance also amended the constitution by empowering the legislature to raise revenues to suppress insurrection and repel invasion, to fix the times for holding elections and to fix the terms of office. These changes were already published as an appended amendment to the version of the constitution published with the January 1861 Miss. Laws. *See also* Ordinance of Jan. 26, 1861, ch. 8, Jan. 1861 Miss. Laws 138 (providing generally that any other provisions of the constitution were annulled to the extent in conflict with any ordinance passed by the convention).

[128] Emancipation Proclamation, 12 Stat. 1267 (1862).

[129] U.S. CONST. amend. XIII.

[130] U.S. CONST. amend. XIV.

However, the legislature simultaneously adopted a "black code" that subjected African Americans to brutal laws and procedures designed to restrict their rights while preserving the political power of whites.[132] Similar resistance throughout the South to the rights of newly freed slaves propelled Republicans in Congress to enact the Reconstruction Act that required more complete constitutional reform as a condition to reentry into the Union.[133]

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[131] MISS. CONST. of 1832, amend. VII (Aug. 21 1865). The eighth amendment, passed the same date, repeated the language of this amendment and provided that it be inserted into the body of the constitution as article eight. MISS. CONST. of 1832, amend. VIII, cl. 2.

This amendment meant to replace the original eighth (but unnumbered) title "Slaves." However, the language of the amendment seems instead to delete the preceding seventh article. *Cf.* MISS. CONST. of 1832, amend. VII, cl. 1 ("That the constitution shall be amended by abolishing and striking out sections one, two and three, of article seven, until the title 'slaves . . . '").

The amendment may have incorporated a transcription error, substituting "until" for "under." The material under the title "Slaves" was not set off as a separately numbered article, so its three numbered sections could have been read as falling under the preceding numbered article (article seven). If it were so read, it would make sense for abolitionists to strike those sections that fell under or after the title "Slaves" but not to delete the material up to ("until") this title.

The proceedings of the convention were published. JOURNAL OF THE PROCEEDINGS AND DEBATES IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF MISSISSIPPI, AUGUST 1865 (Jackson, Miss., E.M. Yeager, State Printer 1865). The first amendment delegating to the legislature the power to regulate the slave trade was also eliminated and was omitted from the official text of the constitution published in session laws after 1865.

[132] The legislature in 1865 created a new system of inferior county courts. Presided over by a single probate judge, they had broad criminal jurisdiction; could proceed without an indictment and without the participation of a district attorney; inflicted punishment by torture; and were not subject to appellate review in many instances. *See generally* Hoffheimer, *Mississippi Courts: 1790-1868*, *supra* note 1, at 167-68. These same county courts were given appellate jurisdiction over the mayor's courts and justices of the peace. *Id.*

For the political effect of the "black code," see WINKLE, *supra* note 10, at 7.

[133] WINKLE, *supra* note 10, at 7.

Mississippi Constitution of 1869. A constitutional convention was proposed and approved in November 1867 by the voters, who now included African Americans. The convention delegates, also including African Americans, met from January to May 1868.[134] The proceedings were published,[135] and the resulting document was submitted for popular ratification—the only time in the state's history a constitution was so submitted.[136]

The proposed constitution offended many whites by extending the franchise to African Americans and by disenfranchising confederate sympathizers,[137] and the general voters rejected the constitution when it was first submitted.[138] But after the limitations on supporters of the confederacy were removed, the proposed constitution was resubmitted and ratified.[139]

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[134] For the history of the convention, see J. GARNER, *supra* note 16, at 216, 245; WINKLE, *supra* note 10, at 7-8; Sansing, *supra* note 10, at 8. *See generally* Paul Perkins Pittman, The Mississippi Constitutional Convention of 1868 (1949) (unpublished M.S. thesis, University of Mississippi) (on file with University of Mississippi, J.D. Williams Library).

[135] JOURNAL OF THE PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF MISSISSIPPI, 1868 (Jackson, Miss., E. Stafford 1871).

[136] *See* Leslie H. Southwick & C. Victor Welsh, III, *Methods of Constitutional Revision: Which Way Mississippi?*, 56 MISS. L.J. 17, 66 (1986).

[137] To be eligible to vote or hold office, a citizen was required to swear that he was not disfranchised by federal law. *See* Proposed Constitution of 1868, art. VII, § 3, *in* JOURNAL OF THE PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF MISSISSIPPI, 1868, at 732. In addition, the draft proposed:

> No person shall be eligible to any office of profit or trust, civil or military, in this State, who, as a member of the Legislature, voted for the call of the Convention that passed the Ordinance of Secession, or who, as a delegate to any Convention, voted for or signed any ordinance of secession, or who gave voluntary aid, countenance, counsel or encouragement to persons engaged in armed hostility to the United States, or who accepted or attempted to exercise the functions of any office, civil or military, under any authority or pretended government authority, power, or Constitution, within the United States, hostile or inimical thereto, except all persons who aided reconstruction by voting for this Convention, or who have continuously advocated the assembling of this Convention, and shall continuously and in good faith advocate the acts of the same. . .

Id. art. VII, § 5 *in* Journal of the Proceedings in the Constitutional Convention of the State of Mississippi, 1868, at 732. Fourteen delegates resigned from the convention when this provision was adopted. *See* WINKLE, *supra* note 10, at 8.

[138] WINKLE, *supra* note 10, at 8.

The constitution of 1869 renounced the right to secede from the Union,[140] repudiated war debts, prohibited slavery[141] and extended suffrage to non-Indian males age twenty-one and older.[142] It also recognized women's property rights.[143]

It strengthened the executive branch by extending the governor's term to four years[144] and restored the office of lieutenant governor.[145] It gave the governor the power to appoint all judges of the supreme court, circuit courts and chancery courts.[146] Some features of the Constitution of 1817 were revived. The high court was renamed "Supreme Court,"[147] and the legislature was again required to meet annually until biennial sessions were restored by amendment in 1877.[148]

The Constitution of 1869 was amended four times. Three amendments were adopted in 1875 and a fourth in 1877.[149]

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[139] *See generally* GARNER, *supra* note 16, at 216, 245; Sansing, *supra* note 10, at 8.

[140] MISS. CONST. of 1869, art. I, § 20.

[141] MISS. CONST. of 1869, art. I, § 19.

[142] MISS. CONST. of 1869, art. I, § 18 ("No property or educational qualification shall ever be required for any person to become an elector."); *id.* art. VII, § 2 (extending franchise to male inhabitants except idiots, insane persons and Indians not taxed, who were twenty-one years old and older and resided in the state for six months and the county one month prior to the day of election and who were registered and not disqualified by reason of any crime).

[143] MISS. CONST. of 1869, art. I, § 16. *See generally* WINKLE, *supra* note 10, at 8-9 (discussing practical problems motivating recognition of these rights).

[144] MISS. CONST. of 1869, art. V, § 1 ("The chief executive power of this State shall be vested in a Governor, who shall hold his office for four years.").

[145] MISS. CONST. of 1869, art. V, § 14.

[146] MISS. CONST. of 1869, art. VI, §§ 2, 11, 17. Justices of the Peace were elected. *Id.* art. VI, § 23.

[147] MISS. CONST. of 1869, art. VI, § 1.

[148] MISS. CONST. of 1869, art. IV, § 6.

[149] MISS. CONST. of 1869, amend. I (prohibiting state from paying bonds issued by Union Bank or Planters Bank); *id.* amend. II (providing that fines and forfeitures collected by state be distributed among educable children in state); *id.* amend. III (providing for appointment of chancellors in same manner as circuit courts for four year terms and reducing to two the number of annual terms required per county for each chancery court); *id.* amend. IV (changing legislative sessions from annual to biannual meetings unless convened sooner by the governor). For the official text of the amendments, see MISS. CONST. of 1869, *in* MISS.

Mississippi Constitution of 1890.[150] The Mississippi Constitution of 1890, still in force today after many amendments, has withstood several waves of efforts to replace it with a newer constitution.[151] In addition to the continuously updat-

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REV. CODE (1880). For legislation authorizing publication after ratification, see Concurrent Resolution of Jan. 18, 1876, Jan.-Apr. 1876 Miss. Laws 1-2 (amendments I-III); Concurrent Resolution of Jan. 15/22, 1878, Jan. 1878 Miss. Laws 1-2 (amendment IV). *See generally* ETHRIDGE, *supra* note 96, at 556-57.

[150] The constitution was published separately at the conclusion of the convention by R.H. Henry & Co., the convention printers. CONSTITUTION OF THE STATE OF MISSISSIPPI ADOPTED NOVEMBER 1, 1890 (Jackson, Miss., R.H. Henry & Co., Convention Printers 1890) (printed by authority).

For discussions of the Constitution of 1890, see ALBERT D. KIRWAN, REVOLT OF THE REDNECKS: MISSISSIPPI POLITICS 1876-1925, at 58 (1951); S.S. Calhoon, *The Causes and Events that Led to the Calling of the Constitutional Convention of 1890*, 6 PUBL. MISS. HIST. SOC'Y 105, 105-10 (1902) (Calhoon was president of the constitutional convention); James P. Coleman, *The Origin of the Constitution of 1890*, 19 J. MISS. HIST. 69, 69-92 (1957); Albert D. Kirwan, *Apportionment in the Mississippi Constitution of 1890*, 14 J. SO. HIST. 234, 234-46 (1948); Luther T. Munford & E. Marcus Wiggs, III, *Commentary on the Bill of Rights in the Mississippi Constitution of 1890 and Beyond*, 56 MISS. L.J. 73, 73-118 (1986); Sansing, *supra* note 10, at 9-12; Southwick & Welsh, *supra* note 136, at 17-71; Eric Charles Clark, The Mississippi Constitutional Convention of 1890: A Political Analysis (1975) (M.A. thesis, University of Mississippi) (on file with University of Mississippi, J.D. Williams Library); Guy B. Hathorn, Suffrage, Apportionment, and Elections in the Mississippi Constitutional Convention of 1890 (1942) (M.A. thesis, University of Mississippi) (on file with University of Mississippi, J.D. Williams Library); William C. Sallis, The Color Line in Mississippi Politics (1967) (Ph.D. dissertation, University of Kentucky) (on file with University of Mississippi, J.D. Williams Library).

[151] There was interest in modernizing or replacing the constitution in the 1930s and again after World War II. *See generally* WILLIAM N. ETHRIDGE, JR., MODERNIZING MISSISSIPPI'S CONSTITUTION (1950). Governor Coleman, who had raised the issue of constitutional reform during his election campaign, called a special session of the legislature to consider the matter in 1957. 1957 Miss. House J., Extraordinary Sess., THIS IS NO TIME TO TAMPER WITH OUR STATE CONSTITUTION: A COLLECTION OF STATEMENTS AND OPINIONS ON THE SUBJECT OF A PROPOSED CONSTITUTIONAL CONVENTION (1957). Professor Sansing concludes that the reform movement died due to fear of change during the era of the civil rights movement. Sansing, *supra* note 10, at 13.

Interest in a new constitution revived in the late 1970s, and in 1983, a bipartisan committee appointed by the Lieutenant Governor proposed calling for a constitutional convention, but the legislature took no action. *See* Sansing, *supra* note 10, at 14. In 1986, Governor Allain appointed a 350-member commission, which drafted a proposed new constitution. *Id.* at 14-15. There was a burst of public discussion of the need for a new constitution in connection with the work of the commission. *See* A CONTEMPORARY ANALYSIS OF MISSISSIPPI'S CONSTITUTION-ed versions of the constitution printed in the official codes, the state has separately published the constitution on several occasions.[152]

After Democrats regained power in 1876, African Americans were effectively excluded from political life by extralegal means. One of the main goals of the constitution was to provide formal, legal means for excluding African Americans from voting and running for office.[153] The 1890 constitution accomplished this with both a poll tax and a literacy test.[154] This had one bibliographic consequence: school textbooks that were aimed at whites soon began to print the text of the constitution.[155] The 1890 constitution mandated racial segrega-

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AL GOVERNMENT (Dana B. Brammer & John W. Winkle III eds., 1986); *Understanding Mississippi's Constitutions: An Historical Perspective* (Barbara Carpenter ed., 1989); *Chained to the Past: Mississippi's Constitution*, CLARION-LEDGER Jan. 3, 10, 17 & 24 1988, at A1 (four-part series on the 1890 constitution); *The State We're In*, CLARION-LEDGER, Dec. 8-15, 1985, at A1 (eight-part series).

For general discussions of state government under the constitution, see R.H. THOMPSON, MISSISSIPPI CONSTITUTION OF 1890 (address delivered to Mississippi State Bar Association n.d.) and LEON A. WILBER AND JEAN FLETCHER, MISSISSIPPI STATE GOVERNMENT: THE CONSTITUTION, LEGISLATURE, AND ADMINISTRATION (1974); LEON A. WILBER, MISSISSIPPI COUNTY GOVERNMENT: A SUMMARY OF CONSTITUTIONAL AND STATUTORY PROVISIONS (1967).

[152] THE CONSTITUTION OF THE STATE OF MISSISSIPPI (1942) (with amendments and annotations through 1942); THE CONSTITUTION OF THE STATE OF MISSISSIPPI (1959) (with amendments and annotations through 1959).

[153] *See* Sansing, *supra* note 10, at 9, 11.

[154] MISS. CONST. art. XII, § 243 (imposing two dollar annual poll tax and authorizing its increase by county supervisors to up to three dollars), *repealed by* 1975 Miss. Laws 524; MISS. CONST. art. XII, § 244 ("[E]very elector shall . . . be able to read any section of the Constitution of the state . . . *or* give a reasonable interpretation thereof."), *repealed by* 1975 Miss. Laws 523 (emphasis added).

In 1946, Medgar Evers and five other African Americans tried to register to vote. *See* MYRLIE B. EVERS, FOR US, THE LIVING 26 (1967). In 1954, segregationists succeeded in imposing an additional special written literacy exam administered by local officials. MISS. CONST. art. XII, § 244 (amended 1954), *repealed by* 1975 Miss. Laws ch. 523. This resulted in Mississippi having the most restrictive voting requirements in the country. *See* YESTERDAY'S CONSTITUTION TODAY, *supra* note 96, at 98 (observing that Mississippi was the only state even in the segregated South in 1960 that had a combination of literacy, interpretation, poll tax and two-year residence requirements).

[155] *E.g.*, MARY V. DUVAL, HISTORY OF MISSISSIPPI AND CIVIL GOVERNMENT: COMPILED AND ARRANGED FOR THE USE OF THE PUBLIC SCHOOLS OF MISSISSIPPI (Louisville, Courier-Journal Job Prtg. Co. 1892) (appendix containing the Constitution of 1890). For other titles by Duval aimed at Mississippi students, see OWEN,

tion by requiring that "[s]eparate schools shall be maintained for children of the white and colored races."[156] It also prohibited marriages between whites and Negroes.[157]

Like the previous constitution, the Constitution of 1890 preserved the governor's four-year term of office, prohibited multiple terms[158] and gave the governor the power to select judges.[159] Efforts to amend the constitution to provide for popular election of judges at all levels began by 1899 and succeeded by 1915.[160] The constitution continued the practice of biennial legislative sessions.[161]

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supra note 43, at 694.

[156] MISS. CONST. art. VIII, § 207 (repealed 1978). Courts construed the definition of "white" under this provision to mean pure-race Caucasian, thus preventing any Negroes of mixed-race ancestry and members of any other races from attending the all-white schools. *See* Rice v. Gong Lum, 104 So. 105 (Miss. 1925); Moreau v. Granich, 75 So. 434 (Miss. 1917). *See generally* ETHRIDGE, *supra* note 96, at 377-78.

[157] MISS. CONST. art. XIV, § 263 (repealed 1987) ("The marriage of a white person with a negro or mulatto, or person who shall have one-eighth or more of negro blood, shall be unlawful and void"). Justice Ethridge provided an unblinking explanation of the supposed need for this provision. ETHRIDGE, *supra* note 96, at 453-54. The legislature enacted general laws to prevent interracial marriages between whites and Asians. *See id.* at 453.

[158] MISS. CONST. art. V, § 116 ("The chief executive power of this State shall be vested in a Governor, who shall hold his office for four years, and who shall be ineligible as his immediate successor in office") (amended 1986) (permitting governor to serve two terms).

[159] MISS. CONST. art. VI, §§ 145, 153 (giving governor power to appoint Supreme Court justices and judges of circuit and chancery courts with advice and consent of senate). For a discussion of the amendments to these sections see *infra* note 160.

[160] In 1898, the legislature had proposed an amendment providing for the popular election of all judges. 1898 Miss. Laws 83. This amendment was approved by the voters, and the legislature voted to insert it into the constitution. 1900 Miss. Laws 199. Nevertheless, the Supreme Court held that the attempted amendment was ineffective because multiple provisions were collectively presented for amendment and because a majority of voters voting in the election did not vote to amend. State *ex rel.* McClurg v. Powell, 27 So. 927 (Miss. 1900). The constitution was eventually amended to provide for the popular election of Supreme Court justices, MISS. CONST. art. VI, § 145, *amended by* 1915 Miss. Laws 156, and of judges of the circuit and chancery courts, MISS. CONST. art. VI, § 153, *amended by* 1912 Miss. Laws 415.

[161] "Regular" sessions were established by the constitution for 1892 and every four years afterwards. MISS. CONST. art. IV, § 36 (amended 1968). "Special" sessions were established for 1894 and every four years afterwards unless called

D. Judicial Decisions

Mississippi Reports. The official reports of the Mississippi Supreme Court and High Court of Errors and Appeals, prepared by authorized reporters and approved by the court,[162] were published and identified by the reporters as follows:

volume	*reporter*	*case dates*	*published*
1 Miss.	R.J. Walker	1818-34	1834[163]
2-3 Miss.	Volney E. Howard	1834-43	1839[164]
9-22 Miss.	W.C. Smedes & T.A. Marshall	1843-50	1844-51[165]
23-254 Miss.	Cushman, et al.[166]	1851-1966	1852-1966[167]

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sooner by the governor. *Id.* (providing for annual sessions unless called sooner by the governor). The special sessions were limited to thirty days in duration (unless extended by the governor) and limited to the consideration of appropriations and revenue bills. *Id.* If the governor wanted to bring other matters before a special session he would have to call an "extraordinary" session. *Id.* The distinction between special and extraordinary sessions is no longer observed, and all unscheduled sessions are now called "special."

[162] The early volumes contain a certificate: "The Judges of the Supreme Court approve the Reports of the Cases, decided in said Court, and prepared for publication by the Reporter thereof . . ." *E.g.*, 1 Miss. (1 Walker) vi (1834).

[163] (Natchez, Miss., printed at the Courier and Journal office 1834).

[164] (Philadelphia, printed by T.K. & P.G. Collins 1839). Howard explained that part of his first volume was derived from a manuscript prepared by the prior reporter, Robert Hughes. *See Preface*, 2 Miss. (1 Howard) v (1839).

[165] (Boston, Charles C. Little and James Brown 1844-1851). For the circumstances surrounding the termination of these reporters, see *supra* note 30.

[166] Smedes and Marshall were the last reporters appointed by the court, and they resigned when legislation provided for the legislative appointment. Their last volume contains a long complaint about the new system. *See Preface*, 22 Miss. (1 S. & M.) v (1851) ("When the legislature stripped from the court the power, enjoyed since its organization, of electing its own reporter, and took directly upon itself, a partisan body, the election of that officer, we declined, whatever under other circumstances might have been our action, to be candidates for the station.").

Legislation also altered the form of the reports, directing the omission of briefs as well as "all cases not deemed important." 1850 Miss. Laws 41. *See generally* JOHN RAY SKATES, JR., A HISTORY OF THE MISSISSIPPI SUPREME COURT, 1817-1948, at 22 (1973).

Beginning with the reports of John F. Cushman in 1852, volumes were identified by a sequential number (23) counting from the first published report, and volumes thenceforth are cited without reference to the reporter.

[167] Little, Brown and Company remained the publisher until 1857. It was suc-

In 1908 West reprinted the entire series of official reports (with annotations). The reported decisions of the Supreme Court and High Court of Errors and Appeals are covered by the citation tables in *The Bluebook*.[168]

Mississippi Decisions. Unreported decisions from 1820 to 1887 were published in two volumes of *Mississippi Decisions* that appeared in 1906 and 1907.[169] *The Bluebook* prescribes a citation form.[170]

Reports of Chancery Court Decisions. The year 1844 saw the launch of two separate (and separately numbered) series of reports of decisions of the Superior Court of Chancery. The attorney general, John D. Freeman, published a volume of opinions from 1839-1943.[171] The official reporters for the Su-

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ceeded by a variety of publishers and itself published volumes 53 and 54 (1877-1878).

[168] THE BLUEBOOK, *supra* note 2, at 211-12. Mississippi has adopted a public domain format for opinions published after July 1, 1997, and *The Bluebook* prescribes that format. In addition, it requires a parallel citation to the regional reporter. *Id.* at 64. For prior cases, it prescribes citation to the *Southern Reporter* (if available) or to the *Mississippi Reports*.

The *Mississippi Rules of Appellate Procedure* permit citations either to the public domain case number and paragraph or to the volume and page number of the published decision in either the *Southern Reporter* or to the *Mississippi Reports*. MISS. R. APP. P. 28(e)(2)-(3) (providing examples).

The citation forms prescribed by *The Bluebook* conform to those permitted by the state rule. The formats permitted by state rule do not conform to *The Bluebook* to the extent that the state rule permits citation to the *Mississippi Reports* for cases before 1967 and to the *Southern Reporter* for cases after 1997. The *Bluebook* does not insert paragraph numbers in parentheses as does the state rule. *Compare* THE BLUEBOOK, *supra* note 2, at 64, *with* MISS. R. APP. P. 28(e)(3).

[169] MISSISSIPPI DECISIONS CONTAINING THE UNREPORTED DECISIONS OF THE SUPREME COURT OF MISSISSIPPI (William Hemingway & C.M. McDonald compilers, 1906-1907). The publisher was the Southern Law Book Company in Jackson, Mississippi, though the verso of the title page identified the printer as Marshall & Bruce Company, Printers and Publishers, Nashville, Tennessee.

[170] *See* THE BLUEBOOK, *supra* note 2, at 212. This form was also prescribed by the editors of the decisions. *See* 1 Miss. Dec., title page verso; 2 Miss. Dec., title page verso.

[171] REPORTS OF CASES DECIDED IN THE SUPERIOR COURT OF CHANCERY, OF THE STATE OF MISSISSIPPI (John D. Freeman reporter) (Cincinnati, E. Morgan and Co. 1844). The reports were labeled volume I and the reporter promised, "The second volume will appear in the course of the coming year." *Preface*, *Id.* at vii. But no second volume ever appeared. The reporter did not, unfortunately, provide dates for the individual cases. Appendix IV proposes citing this volume as 1 Miss. Ch.

preme Court, Smedes and Marshall, published a volume of decisions from 1840-1843.[172] No other volumes were published, and the chancery courts were abolished by constitutional amendment in 1856.[173] *The Bluebook* does not provide citation forms.

Regional Reporter. In 1966, the legislature authorized the Supreme Court to designate any published volumes of its decisions as official reports,[174] and the court designated the regional reports published by West as its official reports.[175] The reports of decisions that West Publishing Co. included in its *Southern Reporter* series are covered by a familiar *Bluebook* rule and now provide the preferred hard-copy citation source under *The Bluebook*.[176]

IV. OTHER LEGAL SOURCES

Before 1788, the only legal texts printed in America other than statutory compilations were intended for men without legal training who served as justices of the peace or who needed to draft their own legal documents.[177] In the first decades of the next century, practice manuals and treatises slowly began to appear, most being American editions of English

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(Freeman) (1839-1843); *see also supra* note 23 for separately published chancery proceedings.

[172] REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPERIOR COURT OF CHANCERY OF THE STATE OF MISSISSIPPI (W.C. Smedes & T.A. Marshall reporters) (Boston, Charles C. Little and James Brown 1844). This was labeled volume I, but no further volumes appeared. Appendix IV proposes citing this source: 1 Miss. Ch. (S. & M.) 1 (1843).

[173] Chancery jurisdiction was then absorbed by the circuit courts. *See generally* Hoffheimer, *Mississippi Courts: 1790-1868*, *supra* note 1, at 148-53 (discussing history of chancery court jurisdiction under Mississippi Constitution of 1832).

[174] MISS. CODE ANN. § 9-3-43 (1972) (effective July 1, 1966).

[175] *See* MISS. R. APP. P. 28(e)(2)-(3). For *Bluebook* rules, see *supra* note 168. For rules governing the citation of appellate decisions, see MISS. R. APP. P. 35-A & 35-B.

[176] *See* THE BLUEBOOK, *supra* note 2, at 62, ("[C]ite the relevant regional reporter, if the decision is found therein . . .").

[177] *See* Eldon Revare James, *A List of Legal Treatises Printed in the British Colonies and the American States Before 1801*, *in* HARVARD LEGAL ESSAYS 159 (1934); CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 338 (1966) (noting, as "the best illustration of the condition of the times," the presence of only twelve American titles in the library of the Chief Justice of Massachusetts in 1814).

treatises, but by the 1850s a wide range of publications had become available.[178]

In Mississippi, however, legal publishing during the eighteenth and most of the nineteenth centuries remained largely limited to the primary sources noted above. In the absence of an indigenous legal literature, Mississippi lawyers, like all early American lawyers, looked to imported texts. They particularly valued English law dictionaries, treatises, digests and abridgements. Occasionally the bench and bar also relied on classic civilian authorities such as Vattel's *Law of Nations*.[179]

The first printing press in Mississippi probably belonged to Lieutenant Andrew Marschalk, later the state printer, which he set up near Vicksburg in 1799.[180] In 1807, Marschalk's successor, Samuel Terrell, printed the Mississippi

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[178] For a comprehensive list of early American treatises, see Jenni Parrish, *Law Books and Legal Publishing in Colonial America, 1760-1840*, 72 L. LIBR. J. 335, 365-452 (1979). *See generally* ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING (1990).

[179] In its December and June 1818 terms, the Mississippi Supreme Court published nineteen decisions averaging three pages in length. The court cited few domestic primary sources beyond United States Supreme Court and Massachusetts state court decisions but referred to more than two dozen English or continental treatises. There were multiple citations not only to Coke, Blackstone and Bacon but also Chitty's *Practical Treatise on Planing*; Buller's *Introduction to the Law Relative to Trials at Nisi Prius*; Peake's *Compendium on the Law of Evidence*; Tidd's *Practice of the Court of King's Bench*; McNally's *Rules of Evidence on Pleas of the Crown* and Phillips's *Treatise on the Law of Evidence*.

"Law books, like everything else in the territory came high . . . ." WILLIAM BASKERVILLE HAMILTON, ANGLO-AMERICAN LAW ON THE FRONTIER: THOMAS RODNEY AND HIS TERRITORIAL CASES 136 (1953). "Coke on Littleton came to $15.00 or $20.00, Blackstone $12.00, and a third standby, cited almost as much as Blackstone, Matthew Bacon's abridgement, cost $40.00." *Id.* Despite the expense, imported titles—and, later, those published in other states—appear to have been generally available. *Id.* (noting that citations to at least eighty different authorities are found in territorial supreme court Judge Thomas Rodney's judicial notebooks (1804-1809)). At least a few frontier lawyers managed to build impressive private libraries. *See* Elizabeth Gaspar Brown, *Frontier Justice: Wayne County 1796-1836*, 16 AM. J. LEGAL HIST. 126, 144 (1968); Michael H. Harris, *The Frontier Lawyer's Library: Southern Indiana, 1800-1855, as a Test Case*, 16 AM. J. LEGAL HIST. 239 (1972) (describing the contents of several frontier Indiana private libraries); Nicholas Sellers, *The Fielding Lewis Turner Law Library*, 86 L. LIB. J. 597, 598 (1994).

[180] *See generally* William B. Hamilton, *The Southwestern Frontier, 1795-1817: An Essay in Social History*, 10 J. S. HIST. 389 (1944).

Territory's first statutory codification[181] as well as its first law-related handbook, both authored by Territorial Judge Harry Toulmin. Toulmin's handbook, a justice of the peace manual, was entitled *The Magistrate's Assistant* and included a glossary, list of precedents and forms.[182]

At the end of the century the justice of the peace manual with forms remained the most popular type of secondary legal publication in Mississippi.[183] Because these manuals were also published together with statutory codifications and case reporters, they appear to have been marketed to both lawyers and laymen.[184]

A bibliography of law-related materials published before 1900 is contained in Appendix III. This bibliography includes titles that were either published in Mississippi or were aimed at Mississippi practitioners. It includes primary and secondary legal authorities that are not treated elsewhere in this article, such as municipal ordinances, separately published opinions and treatises. It does not, however, attempt to provide comprehensive coverage of works of broader historical and biographical character, even when they contain important information about legal institutions and members of the bench and bar.[185] Nor does it include political speeches or other partisan or polemical works.[186] It omits printed works of which there are no known existing copies,[187] almanacs,[188] individually published constitutions[189] and literary works by members of the bench and bar.[190] Accordingly, it does not

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[181] *See* HARRY TOULMIN, THE STATUTES OF THE MISSISSIPPI TERRITORY (Natchez, Miss., Terrell 1807).

[182] *See* MCMURTRIE, *supra* note 7, at 50.

[183] *See, e.g.*, L.O. BRIDEWELL & J.L. POWER, THE MISSISSIPPI FORM BOOK AND COURT, RAILROAD AND POSTOFFICE GUIDE: A MANUAL FOR JUSTICES OF THE PEACE, ATTORNEYS, AND BUSINESS MEN GENERALLY (rev. ed., Jackson, Miss., The Clarion-Ledger Prtg. Establishment 1893).

[184] *See. e.g.*, V.E. Howard & A. Hutchinson, *A Manual for Clerks, Sheriffs and Justices of the Peace in* STATUTES OF THE STATE OF MISSISSIPPI OF A PUBLIC AND GENERAL NATURE (New Orleans, E. Johns & Co. 1840). *But cf.* L.O. BRIDEWELL, THE MISSISSIPPI JUSTICE OF THE PEACE: A MANUAL OF THE LAWS RELATING TO THE COURTS OF JUSTICES OF THE PEACE, AND THE PRACTICE THEREIN, IN THE STATE OF MISSISSIPPI iii (Jackson, Miss., Clarion Steam Prtg. Establishment 1877) ("The design of the following work is to impart to novices, gentlemen *not* 'learned in the law above their fellows,' the routine of business required of them, when they assume the responsible and now important office of Justice of the Peace.").

[185] It omits various offprints of speeches delivered to Congress as well as works by and about Jefferson Davis, many of which address constitutional issues. *Cf.* ALBERT TAYLOR BLEDSOE, IS DAVIS A TRAITOR; OR WAS SECESSION A CONSTITUTIONAL RIGHT PREVIOUS TO THE WAR OF 1861? (Baltimore, Innes & Co. 1866).

Other notable omissions include: J.F.H. CLAIBORNE, LIFE AND CORRESPONDENCE OF JOHN A. QUITMAN, MAJOR-GENERAL, U.S.A., AND GOVERNOR OF THE STATE OF MISSISSIPPI (2 vols.) (New York, Harper & Bros. 1860); J.F.H. CLAIBORNE, MISSISSIPPI AS A PROVINCE, TERRITORY, AND STATE: WITH BIOGRAPHICAL NOTICES OF EMINENT CITIZENS (Jackson, Miss., Power & Barksdale 1880); REUBEN DAVIS, RECOLLECTIONS OF MISSISSIPPI & MISSISSIPPIANS (Boston, Houghton, Mifflin & Co. 1889) (rev. ed. with new introduction 1972) (autobiography of Supreme Court justice and member of Congress); H.S. FULKERSON, RANDOM RECOLLECTIONS OF EARLY DAYS IN MISSISSIPPI (Vicksburg, Miss., Vicksburg Prtg. and Publ'g Co. 1885); GOODSPEED [BROTHERS], BIOGRAPHICAL AND HISTORICAL MEMOIRS OF MISSISSIPPI, EMBRACING AN AUTHENTIC AND COMPREHENSIVE ACCOUNT OF THE CHIEF EVENTS IN THE HISTORY OF THE STATE, AND A RECORD OF THE LIVES OF MANY OF THE MOST WORTHY AND ILLUSTRIOUS FAMILIES AND INDIVIDUALS (Chicago, Goodspeed Publ'g Co. 1891); ROBERT LOWRY & WILLIAM H. MCCARDLE, A HISTORY OF MISSISSIPPI FROM THE DISCOVERY OF THE GREAT RIVER BY HERNANDO DESOTO, INCLUDING THE EARLIEST SETTLEMENT MADE BY THE FRENCH, UNDER IBERVILLE, TO THE DEATH OF JEFFERSON DAVIS (Jackson, Miss., R.H. Henry & Co. 1891).

[186] *E.g.*, SAMUEL CLEMENT, TRUTH IS NO SLANDER; THEREFORE READ, ENQUIRE, REFLECT (Natchez, Miss., printed at the Ariel Office 1827) (criticizing General Jackson's actions at the Battle of New Orleans); H.P. NUGENT, H.P. NUGENT'S REPLY TO THE CALUMNIES OF THE HONORABLE F.X. MARTIN, ONE OF THE JUDGES OF THE SUPERIOR COURT OF THE TERRITORY OF ORLEANS (Natchez, Miss., printed for the author 1811); Cato, TO THE CITIZENS OF THE STATE OF MISSISSIPPI [1822?] *in* MCMURTRIE, *supra* note 7, at 59, 96, 118 (arguing against reelection of Congressman Poindexter).

[187] *E.g.*, RULES OF THE LEGISLATIVE COUNCIL (Natchez, Miss., Samuel Terrell 1806). Of the ten copies printed, none is known to still exist. MCMURTRIE, *supra* note 7, at 46.

[188] Almanacs sometimes printed the state constitution along with other practical information. *Cf.* THE MISSISSIPPI AND LOUISIANA ALMANAC, FOR THE YEAR OF OUR LORD 1818 (Natchez, Miss., Andrew Marschalk [1817]) *catalogued in* MCMURTRIE, *supra* note 7, at 76 (including text of Mississippi constitution).

[189] *E.g.,* An Act to Establish a Bank in the Mississippi Territory: Passed the 23d December, 1809 (Natchez, Miss., printed by John W. Winn & Co. 1811) *in* MCMURTRIE, *supra* note 7, at 58; An Act for the More Healthy Police of the City of Natchez and to Provide Against Infectious and Pestilential Diseases (Natchez, Miss., printed by Richard C. Langdon 1818) *in* MCMURTRIE, *supra* note 7, at 82. For separate printings of the state constitution, see *id.* catalogue nos. 104, 105, 148, 160, 171 at 77, 78, 93, 96, 100.

[190] *E.g.*, JUDGE J.F. SIMMONS, THE WELDED LINK, AND OTHER POEMS (Philadelphia, J.B. Lippincott & Co. 1881). This title and another by the same author are catalogued in OWEN, *supra* note 43, at 803, which identified their author as a judge. It appears J.F. Simmons was chancellor in Tallahatchie County in 1870.

supplant existing bibliographies.[191]

See Public Officers of Tallahatchie County MS, USGen Web Project, *Chancellors of Tallahatchie County Mississippi*, at http://www.rootsweb.com/~mstallah/govern/chancellors.htm.

[191] In addition to the bibliographies identified in other notes, see Jenni Parrish, *A Guide to American Legal History: Methodology with an Example of Research in Progress*, 86 L. LIBR. J. 105, 124-27 (1994) (appendix on "Southern Legal History: A Selective Bibliography, with Emphasis on the Law of Slavery").

APPENDIX I
COMPLETE LIST OF PRE-1900 STATE SESSION LAWS

Session	starting date	status	publisher,[192]	date[193]
1st	Oct. 1817	[regular[194]]	Andrew Marschalk	1818
2d	Jan. 1819		Marschalk & Evens	1819
3d	Jan. 1820		Richard C. Langdon	1820
4th	Jan. 1821		A. Marschalk	1821
5th	Nov. 1821		P. Isler	1822
[5th]	June 1822	adjourned?[195]		
[5th]	June 1822	(private) . . . .published with 6th session[196]		
6th	Dec. 1822		C.S. Crutcher	1822-23
7th	Dec. 1823		P. Isler	1824
8th	Jan. 1825		Silas Brown	1825
9th	Jan. 1826		Peter Isler	1826
10th	Jan. 1827		P. Isler	1827
11th	Jan. 1828		P. Isler	1828
12th	Jan. 1829		P. Isler	1829
13th	Jan. 1830		P. Isler	1830
14th	Nov. 1830		P. Isler	1830
15th	Nov. 1831		P. Isler	1831
16th	Jan. 1833		P. Isler	1833
17th	Nov. 1833		George R. Fall	1834
[18th[197]]	1835	called session passed no acts		

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[192] The publisher was identified on the title page in almost every volume as "printer for the state" or "state printer."

[193] The legislature met in the state capital. This was Natchez through the fourth session in 1821, Columbia for the fifth session (November 1821) and Jackson after the sixth (1822) session.

[194] The status was not indicated on the title page of session laws before 1836.

[195] The fifth session volume at the State Library (which lacks the title page found on some editions) appears to bind together two separate parts. The first comprises general laws adopted in November 1821. The second comprises general laws adopted through June 1822.

[196] A typed note inside the sixth session volume held by the State Library of Mississippi explains:

> The June, 1822 session was the 5th session of the Gen. Assembly and was held in Columbia, whereas the Dec. 1822 session was the 6th session and was held in Jackson. The Laws contained herein are the Private and Local acts passed at the June, 1822 session, together with the general laws passed at the Dec. 1822 session. The Laws of 1822 contains the general and public laws of the June, 1822 session.

June-Dec. 1822 Miss Laws (quoting a typed note found only in the volume held by the State Library of Mississippi, Jackson, Miss.).

[197] After 1833, the sessions were no longer officially identified by sequential

Jan. 1836	regular	G.R. & J.S. Fall	1836
Jan. 1837	adjourned	G.R. & J.S. Fall	1837
Apr. 1837	called	G.R. Fall	1837
Jan. 1838	regular	B.D. Howard	1838
Jan. 1839	adjourned	B.D. Howard	1839
Jan. 1840	regular	C.M. Price	1840
Jan. 1841	adjourned	C.M. Price	1841
Jan. 1842	regular	C.M. Price & G.R. Fall	
July 1843	called	C.M. Price & G.R. Fall	
Jan. 1844	regular	C.M. Price & S. Rohrer	
Jan. 1846	regular	C.M. Price & G.R. Fall	
Jan. 1848	regular	Price & Fall	1848
Jan. 1850	regular	Fall & Marshall	1850
Nov. 1850	called	Fall & Marshall	1850
Jan. 1852	regular	Palmer & Pickett	1852
Oct. 1852	called	Palmer & Pickett	1852[198]
Jan. 1854	regular	Barksdale & Jones	1854
Jan. 1856	regular	E. Barksdale	1856
Dec. 1856	adjourned	E. Barksdale	1857
Nov. 1857	regular	E. Barksdale	1858
Nov. 1858	called	E. Barksdale	1859
Nov. 1859	regular	E. Barksdale	1860
Nov. 1860	called	E. Barksdale	1860
Jan. 1861	called	E. Barksdale	1861
July 1861	called	E. Barksdale	1861
Nov. 1861	regular	Cooper & Kimball	1862
Dec. 1862	called		
and Nov. 1863	regular	Cooper & Kimball	1864[199]
March 1864	called	?[200]	
Aug. 1864	called	J.J. Shannon & Co.	1864[201]
Feb. 1865	called	J.J. Shannon & Co.	1865
Oct. 1865	regular	J.J. Shannon & Co.	1866
Oct. 1866	called	J.J. Shannon & Co.	1867
Jan. 1870	regular	Kimball, Raymond & Co.	1870
Jan. 1871	regular	Alcorn & Fisher	1871
Jan. 1872	regular	Kimball, Raymond & Co.	1872
Jan. 1873	regular	Kimball, Raymond & Co.	1873

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number on the title page of the printed session laws. Nevertheless, some sources continued to refer to them by number.

[198] Actually printed in 1853.

[199] This volume, containing the laws of the called 1862 and regular 1863 sessions, was published in Selma, Alabama.

[200] We have been unable to locate a title page for this volume.

[201] This session of the legislature was held in Macon, and the proceedings were published in Meridian.

Oct. 1873	called	Kimball, Raymond & Co.	1874
Jan. 1874	regular	Pilot Publishing Co.	1874
Dec. 1874	called	Pilot Publishing Co.	1875
Jan. 1875	regular	Pilot Publishing Co.	1875
July 1875	called	Pilot Publishing Co.	1875
Jan. 1876	regular	Pilot Publishing Co.	1876
Jan. 1877	regular	Power & Barksdale	1877
Jan. 1878	regular	Power & Barksdale	1878
Jan. 1880	regular	J.L. Power	1880
Jan. 1882	regular	J.L. Power	1882
Jan. 1884	regular	J.L. Power	1884
Jan. 1886	regular	R.H. Henry	1886
Jan. 1888	regular	R.H. Henry	1888
Jan. 1890	regular	R.H. Henry	1890
Jan. 1892	regular[202]	R.H. Henry	1892
Jan. 1894	special	Clarion-Ledger,[203]	1894
Jan. 1896	regular	Clarion-Ledger	1896
Apr. 1897	extraordinary	Clarion-Ledger	1897
Jan. 1898	special	Clarion-Ledger	1898
Jan. 1900	regular	The Vance Printing Co.,[204]	1900

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[202] For the meanings of "regular," "special," and "extraordinary" sessions after 1890, see *supra* text accompanying note 161.

[203] The publisher's name was printed "The Clarion-Ledger Publishing Co." in the 1894 laws but was shortened to "Clarion-Ledger" in the following years.

[204] The Vance Printing Co. in Jacksonville, Florida, was apparently the first out-of-state publisher to be selected as state printer for the session laws.

APPENDIX II
BLACKSTONE'S INFLUENCE ON CODES OF 1840, 1848, 1857

Blackstone's *Commentaries* presented topics under four books. Book I ("Rights of Persons") included the powers of the state and rights of persons under various status relationships. Book II ("Rights of Things") included property. Book III ("Private Wrongs") included civil procedure and torts. Book IV ("Public Wrongs") included criminal law. This presented many problems. For example, the treatment of contracts was divided between substantive property-type rights created by agreement (placed in book II) and actions to enforce breaches of contract (considered in book III).

The Mississippi codifiers understood "Slaves, Free Negroes, and Mulattoes" as a creature of public law, emphasizing slave law as a matter of status relationship rather than private property right.

The overall influence of Blackstone's schema on the codes of 1840, 1848 and 1857 is evident from a consideration of select topics. The departure of the code of 1871 from this schema is also apparent.

Topic	*1840*	*1848*	*1857*	*1871*
state's boundaries	ch. 1	ch. 2	ch. 1	ch. 2
elections	ch. 7	ch. 7	ch. 4	ch. 6
slaves	ch. 11	ch. 37	ch. 33	[abolished]
militia	ch. 18	ch. 16	ch. 34	ch. 46
contracts	ch. 35	ch. 47	ch. 43[205]	ch. 60[206]
decedent's estates	ch. 36	ch. 44	ch. 36	ch. 35
Circuit Court	ch. 40	ch. 53	ch. 61	ch. 8
evidence	ch. 46	ch. 60	ch. 61[207]	ch. 8[208]
crimes	ch. 49	ch. 64	ch. 64	ch. 58

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[205] Contracts were covered under separate topics and given separate chapters. *See* MISS. REV. CODE ch. 43 (1857) (bonds, notes, bills); *id.* ch. 44 (statute of frauds); *id.* ch. 45 (gaming contracts); *id.* ch. 46 (surety contracts).

[206] The only contracts topic given its own chapter was the statute of frauds. MISS. REV. CODE ch. 60 (1871).

[207] Evidence was reorganized in the 1857 code so that topics relating to different courts were included under the chapter treating each court.

[208] Evidence was again treated under specific courts. *See* MISS. REV. CODE ch. 8, art. 10 (1871) (treating competence of witnesses in circuit court).

APPENDIX III
BIBLIOGRAPHY OF OTHER LEGAL SOURCES[209]

Ordinances[210]

Meridian. THE CHARTER AND CODE OF ORDINANCE OF THE CITY OF MERIDIAN (published by authority) (C.W. Gallagher compiler, Meridian, Miss., Meridian Gazette Job Office 1872)

Meridian. THE ORIGINAL CHARTER TOGETHER WITH THE AMENDMENTS THERETO, AND THE REVISED CODE OF ORDINANCES OF THE CITY OF MERIDIAN, MISS., MISS. (Meridian, Miss. Democrat Book & Job Print 1889)

Columbus. THE CHARTER AND ORDINANCES OF THE CITY OF COLUMBUS, IN LOWNDES COUNTY, MISSISSIPPI (published by authority) (Columbus, Miss., Excelsior Book and Job Office 1874)

Columbus. THE CHARTER AND ORDINANCES OF THE CITY OF COLUMBUS, LOWNDES COUNTY, MISSISSIPPI, CHARTER APPROVED MARCH 8, 1884 (published by authority) (Columbus, Miss., Index Book and Job Office 1884)

Natchez. ORDINANCES OF THE CITY OF NATCHEZ, AND MISSISSIPPI STATE LAWS WHICH RELATE TO THE CITY OF NATCHEZ: PUBLISHED BY ORDER OF THE CORPORATION (Natchez, Miss., printed by Marschalk & Idol 1822)

Natchez. ORDINANCES OF THE CITY OF NATCHEZ, WITH THE ACTS OF THE LEGISLATURE OF THE STATE OF MISSISSIPPI IN REGARD TO SAID

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[209] The authors compiled this bibliography from published bibliographies, catalogues and on-line data bases. They have not inspected many of these titles. The format followed for listings in this appendix incorporates *The Bluebook* rule for pre-1900 books and provides the place of publication and the publisher (or printer) when known. *See* THE BLUEBOOK, *supra* note 2, at 111. In order to preserve information that is important for historians and bibliographers, the listings usually provide full subtitles. *Cf. id.* R.15.2, at 109 (prescribing subtitle only "if it is particularly relevant"). For the same reason, where a publisher is not identified but the printer is known, the printer is identified.

[210] In addition to the works listed, J. Bowmar Harris compiled and published the ordinances of Jackson in 1890. *See* OWEN, *supra* note 43, at 723. But this title is not separately catalogued in any available source.

CITY: CONTAINING ALL ORDINANCES IN FORCE UP TO THE 9TH JUNE, 1829 (Natchez, Miss., printed by William C. Grissam & Co. 1829)

Legislative Journals

Even before statehood, the official printers regularly published the legislative journals of the legislative council and General Assembly of the Mississippi Territory.[211] After statehood, the official printers for each session's laws routinely published the Journal of the House of Representatives and the Journal of the Senate for that session.[212] The legislature published a manual in 1870, *Manual of the Legislature of the State of Mississippi (1870).*

Trials, Briefs, Printed Arguments, Grand Jury Charges[213]

[ADELBERT AMES], THE TESTIMONY IN THE IMPEACHMENT OF ADELBERT AMES, AS GOVERNOR OF MISSISSIPPI (printed by authority) (Jackson, Miss., Power & Barksdale 1877)

ABSTRACT AND BRIEF IN THE CASE OF DAVID MCCAA ADMINISTRATOR, VS. ANN E. MCPHERSON, IN THE HIGH COURT OF ERRORS AND AP-

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[211] *See supra* note 7. Along with the official journals should be mentioned GEORGE DAVIS, A CONCISE SKETCH OF THE DEBATES AND PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES OF THE MISSISSIPPI TERRITORY, CONVENED AT THE TOWN OF WASHINGTON, ON THE FIFTEENTH OF SEPTEMBER, IN THE YEAR ONE THOUSAND EIGHT HUNDRED AND EIGHT (Natchez, Miss., John W. Winn & Co. 1808), *in* MCMURTRIE, *supra* note 7, at 52, and OWEN, *supra* note 43, at 684.

[212] No House or Senate journals could be found for the second (January 1819) session. McMurtrie does not list journals for this session, and Crandall's catalogue omits those. MCMURTRIE, *supra* note 7; CRANDALL, *supra* note 36, at 78-79. A list prepared by Liz Thompson shows that the State Library holds House and Senate journals for most years before 1900. McMurtrie catalogued titles for all the missing sessions through 1830 except January 1819. There are either Senate or House journals held for the few years 1830 in which the State Library lacks a holding of one of the houses except for the called session in November 1850. From these sources it appears most probable that official journals were published by both houses for all sessions except for the 1819 session and possibly for the called 1850 session. There are a few bibliographic anomalies observed in the volumes consulted: Peter Isler printed the journals for the House and Senate for the sixth session (1823) whereas C.S. Crutcher published the session laws for that session. MCMURTRIE, *supra* note 7, at 100-01.

[213] The following titles are given in the format prescribed by *The Bluebook* for books in order to preserve important bibliographic information such as full title, place of publication and publisher. *See supra* note 209 and accompanying text. They should not necessarily be cited in the format prescribed for books.

PEALS, OF THE STATE OF MISSISSIPPI (Fayette, Miss., printed at the Jefferson Journal Office 1858)

[JAMES R. CHALMERS], CONTESTED-ELECTION CASE OF JAMES R. CHALMERS VS. J.B. MORGAN, FROM THE SECOND CONGRESSIONAL DISTRICT OF MISSISSIPPI (Washington, Gov't Prtg. Office 1889)

JAMES R. CHALMERS, THE RECENT DECISION OF THE SUPREME COURT OF MISSISSIPPI ON MARKED BALLOTS: SPEECH OF HON. JAMES R. CHALMERS, OF MISSISSIPPI, IN THE HOUSE OF REPRESENTATIVES, THURSDAY, FEBRUARY 24, 1881 (Washington, D.C., 1881)

GEORGE R. CLAYTON, ARGUMENT OF GEORGE R. CLAYTON, FOR APPELLANT: HIGH COURT OF ERRORS AND APPEALS, APR. TERM, 1860: CALEB, A SLAVE OF WM. KIDD, APPELLANT, VERSUS THE STATE OF MISSISSIPPI, RESPONDENT. APPELLANT INDICTED FOR THE CRIME OF MURDER (Columbus, Miss., "Mississippi Democrat" Power Press 1860)

D.C. GLENN, OPINION OF HON. D.C. GLENN, ATTORNEY GENERAL OF MISSISSIPPI: PRESIDING AS SPECIAL CHANCELLOR IN THE SUPERIOR COURT OF CHANCERY AT JACKSON, JUNE TERM, 1854, IN THE CASE OF JAMES L. CALCOTE, COMPLAINTANT, VS. FREDERICK STANTON AND HENRY S. BUCKNER, DEFENDENTS [sic]. (n.p., 1854)

[JOSHUA GREEN], IN THE MISSISSIPPI COURT OF CHANCERY (HINDS COUNTY): JOSHUA GREEN, NO. 2439 VS. W.H. GIBBS, AUDITOR, &C., AND W.L. HEMINGWAY, TREASURER, &C., AND EX-OFFICIO LEVEE COMMISSIONERS, &C. (Memphis, Jones, Huhn & Co. 1890)

J.S. HAMM, CHARGE DELIVERED BY HON. J.S. HAMM, JUDGE OF THE 7TH JUD. DIST., MISS., TO THE GRAND JURY OF KEMPER COUNTY, AT SEPT. TERM 1877, OF THE CIRCUIT COURT: PUBLISHED BY REQUEST OF MANY MEMBERS OF THE BAR AND OTHER PERSONS (Meridian, Miss., Shannon & Powell 1877)

J.S. HAMM, CHARGE DELIVERED BY HON. J.S. HAMM, JUDGE OF THE 7TH JUD. DIST., MISS., TO THE GRAND JURY OF LAUDERDALE COUNTY, AT FEBRUARY TERM, 1879, OF THE CIRCUIT COURT (Meridian, Miss., Shannon & Powell 1879)

JAMES T. HARRISON, ET AL., BRIEF OF JAMES T. HARRISON, AND

Meek & Sims, in the Supreme Court of Mississippi in the Case of Joseph N. Eskridge, Plaintiff in Error, vs. the 858 State of Mississippi, Defendant in Error: From the Circuit Court of Noxubee County (Columbus, Miss., printed at the Excelsior Book and Job Prtg. Office 1875)

[James Hill], Contested-Election Case of James Hill v. T.C. Catchings, From the Third Congressional District of Mississippi (Washington, Gov't Prtg. Office 1889)

[James Hill], Contested-Election Case of James Hill v. T.C. Catchings, From the Third Congressional District of Mississippi: Brief for Contestee (Washington, Geor. R. Gray 1889)

H.R. Howard, The History of Virgil A. Steward: And His Adventure in Capturing and Exposing the Great "Western Land Private" and His Gang, in Connexion with the Evidence; Also of the Trials, Confessions and Execution of a Number of Murrell's Associates in the State of Mississippi During the Summer of 1835, and the Execution of Five Professional Gamblers by the Citizens of Vicksburg, on the 6th July, 1835 (New York, Harper & Bros. 1838)

James Johnson, Brief of Meek & Sims in the Supreme Court of the State of Mississippi, in the Case of James Johnson, Plaintiff in Error, vs. the State of Mississippi: In Error from the Circuit Court of Oktibbeha County: Plaintiff in Error Indicted for the Crime of Murder (Columbus, Miss., Excelsior Book & Job Office 1871)

Journal of the Senate of the State of Mississippi, Sitting as a Court of Impeachment, in the Trials of Adelbert Ames, Governor, Alexander K. Davis, Lieutenant Governor, Thomas W. Cardozo, Superintendent of Public Education (Jackson, Miss., Power & Barksdale 1876)

[Henry Kernaghan], Contested-Election Case of Henry Kernaghan vs. Charles E. Hooker, From the Seventh Congressional District of Mississippi (Washington, Gov't Prtg. Office 1889)

Benjamin Lumpkin and David M. Philp, Full Report of the

GREAT KU-KLUX TRIAL IN THE U.S. DISTRICT COURT AT OXFORD, MISS.: EVIDENCE OF WITNESSES, ARGUMENTS OF COUNSEL, DECISION AND RULINGS OF JUDGE HILL, INCIDENTS, &C. (Memphis, W.J. Mansford 1871)

JAMES DANIEL LYNCH, REDPATH; OR THE KU-KLUX TRIBUNAL (Columbus, Miss., Excelsior Book and Job Prtg. Establishment 1877)

JOHN M. MAURY, ARGUMENT ON THE BANK ACTS OF 1843 AND 1843: A.M. SESSIONS VS. ELIJAH PEALE, TRUSTEE OF THE AGRICULTURAL BANK, IN CHANCERY (n.p., 1846)

W. NUGENT ET AL., ARGUMENTS OF W.L. NUGENT, S.S. CALHOON AND W.P. HARRIS, OF COUNSEL FOR JONES S. HAMILTON, L.M. EUBANK, WM. HARDY, J.W. ALBRECHT AND W.H. FIGURES, CHARGED WITH THE MURDER OF R.D. GAMBRELL, ON THEIR PETITION FOR THE WRIT OF HABEAS CORPUS. BEFORE CHANCELLOR E.G. PEYTON ([n.p.], 1887)

J. PENNOYER, A REPORT OF THE TRIAL OF BRIGADIER GENERAL J.H. M'COMAS, OF THE SECOND BRIGADE FIRST DIVISION MISSISSIPPI MILITIA, ON CHARGES PREFERRED BY MAJOR-GENERAL SAMUEL L. WINSTON, BY ADJUTANT J. PENNOYER, MARSHALL OF THE COURT (Natchez, Miss., printed by James Hughes 1825)

PITTMAN ET AL., IN THE SUPREME COURT, STATE OF MISSISSIPPI, APR. TERM, 1877. JEFFERSON DAVIS, APPELLANT, VS. JOS. H.D. BOWMAR, EX'R OF JOS. E. DAVIS, DECEASED, ET AL., APPELLEES: ARGUMENT OF PITTMAN & PITTMAN, FOR APPELLANT (Jackson, Miss., Charles Winkley 1877)

J.R.S. PITTS, LIFE AND BLOODY CAREER OF THE EXECUTED CRIMINAL, JAMES COPELAND, THE GREAT SOUTHERN LAND PIRATE LEADER OF A DEVASTATING CLAN RANGING OVER A GREAT PORTION OF THE NATION, PARTICULARLY THE GULF STATES, SPREADING TERROR AND INSECURITY EVERYWHERE (Jackson, Miss., Pilot Pub'g Co. 1874)[214]

THOMAS BUCK REED, A DEFENCE OF THOMAS B. REED, AGAINST THE CHARGES PREFERED [SIC] AGAINST HIM, BY WILEY P. HARRIS, OF

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[214] The rest of the title, referring to the "mystic alphabet of the clan" and an appendix are omitted. Owen's catalog indicates that this title was a second edition. OWEN, *supra* note 43, at 785.

HOLMESVILLE (Natchez, Miss., printed by William C. Grissam & Co. 1828)

[AARON SHELBY], BRIEF OF THE COUNSEL FOR DEFENDANT IN ERROR IN THE CASE OF AARON SHELBY VS. JAMES L. ALCORN, LEVEE COMMISSIONER OF COAHOMA COUNTY, IN THE HIGH COURT OF ERRORS AND APPEALS OF THE STATE OF MISSISSIPPI [BY] FULTON ANDERSON AND J.W.C. WATSON FOR THE DEFENDANT IN ERROR (Jackson, Miss., Mississippian Job Office 1858)

THE STATE OF MISSISSIPPI, VS. HEZRON A. JOHNSON: INVOLVING THE LIABILITY OF THE STATE OF MISSISSIPPI FOR THE PAYMENT OF THE BONDS ISSUED FOR AND ON ACCOUNT OF THE MISSISSIPPI UNION BANK (Jackson, Miss., printed by Thomas Palmer 1853)

J. A. VAN DE VELDE ET AL., APPELLANTS, VS. THE CITY OF NATCHEZ, APPELLEE (n.p., 1858)

ROBERT J. WALKER, ARGUMENT OF ROBERT J. WALKER, ESQ., BEFORE THE SUPREME COURT OF THE UNITED STATES, ON THE MISSISSIPPI SLAVE QUESTION, AT JANUARY TERM, 1841: INVOLVING THE POWER OF CONGRESS AND OF THE STATES TO PROHIBIT THE INTER-STATE SLAVE TRADE (Philadelphia, printed by J.C. Clark 1841) (Argument for Moses Groves in the case of Groves et al. v. Slaughter.)

JOHN W. C. WATSON, THE CORRECTNESS OF AN IMPORTANT DECISION BY THE SUPREME COURT OF MISSISSIPPI QUESTIONED: BEM PRICE VS I.M. ANDERSON: APPEAL FROM LAFAYETTE CIRCUIT COURT (n.p., 1888)

Treatises and Justice of the Peace Manuals

L.O. BRIDEWELL, THE MISSISSIPPI JUSTICE OF THE PEACE: A MANUAL OF THE LAWS RELATING TO THE COURTS OF JUSTICES OF THE PEACE, AND THE PRACTICE THEREIN, IN THE STATE OF MISSISSIPPI (Jackson, Miss., Clarion Steam Prtg. Establishment 1877)

L.O. BRIDEWELL, THE MISSISSIPPI JUSTICE: A MANUAL OF LEGAL AND BUSINESS FORMS (rev. ed., Jackson, Miss., Clarion Steam Ptrg. Establishment 1885)

L.O. BRIDEWELL AND J.L. POWER, THE MISSISSIPPI FORM BOOK AND

COURT, RAILROAD AND POSTOFFICE GUIDE: A MANUAL FOR JUSTICES OF THE PEACE, ATTORNEYS, AND BUSINESS MEN GENERALLY (rev. ed., Jackson, Miss., The Clarion-Ledger Prtg. Establishment 1893)

JAMES R. CHALMERS AND RALPH NORTH, THE PROBATE LAW AND PRACTICE IN THE COURTS OF MISSISSIPPI AND TENNESSEE (Rochester, Lawyers' Co-operative Publ'g Co. 1890)

JOHN M. CHILTON, A DIGEST OF THE LAWS RESPECTING WILLS, EXECUTORS AND ADMINISTRATORS, JURISDICTION AND PRACTICE OF THE COURTS OF PROBATE AND EQUITY IN RELATION TO THE ESTATES OF DECEDENTS ALSO THE LAW OF DESCENT, DISTRIBUTION, DOWER, AND GUARDIAN AND WARD, INCLUDING THE STATUTES AND DECISIONS OF THE HIGH COURT OF ERRORS AND APPEALS OF THE STATE OF MISSISSIPPI AND THE JUDICIAL DECISIONS OF OTHER STATES OF THE UNION ON THE SAME SUBJECT (Vicksburg, Miss., Printed by M. Shannon for the author 1846)

Volney Erskine Howard and Anderson Hutchinson, *A Manual for Clerks, Sheriffs and Justices of the Peace* in the STATUTES OF THE STATE OF MISSISSIPPI OF A PUBLIC AND GENERAL NATURE (New Orleans, E. Johns & Co. 1840)

ANDERSON HUTCHINSON, MANUAL OF JURIDICAL, MINISTERIAL AND CIVIL FORMS, REVISED, AMERICANIZED, AND DIVESTED OF USELESS VERBIAGE: COMPRISING THE PROCESS, PROCEEDINGS AND ENTRIES BEFORE JUSTICES OF THE PEACE AND IN THE INFERIOR, SUPERIOR AND APPELLATE COURTS OF MISSISSIPPI, WITH ILLUSTRATIONS OF THE AUTHOR'S SYSTEM OF OPENING AND CONDUCTING THE CLERK'S OFFICES; ALSO: CONVEYANCES, MORTGAGES, TRUSTS, AND THE VARIOUS INSTRUMENTS IN POPULAR USE (Jackson, Miss., Barksdale & Jones 1852)

J.S. MORRIS, MISSISSIPPI STATE CASES BEING CRIMINAL CASES DECIDED IN THE HIGH COURT OF ERRORS AND APPEALS, AND IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI, FROM THE JUNE TERM 1818 TO THE FIRST MONDAY IN JANUARY 1872, INCLUSIVE, WITH EXPLANATORY NOTES OF ENGLISH AND AMERICAN DECISIONS AND AUTHORITIES AND A MANUAL OF FORMS FOR MAKING UP RECORDS, ENTRIES, CRIMINAL PLEADINGS, ETC. (2 vols.) (Jackson, Miss., printed by the compiler 1872)

Ralph North, A Treatise on the Law and Practice of the Probate Courts of Mississippi Comprising a Compilation of the Statutes of the State on the Subject of the Probate Courts, Last Wills and Testaments, Estates of Decedents, Infants and Persons Non Compos Mentis, Dower, and Partition of Lands: The Whole Methodically Arranged, and Illustrated with Notes on the Common Law, and American Jurisprudence: To Which is Added an Appendix of Forms and Precedents: Being a Full and Complete Manual of Practice, Adapted to the Use of Lawyers, Judges and Clerks of Courts, Sheriffs, Executors, Administrators and Guardians (Philadelphia, Thomas, Cowperthwait & Co. 1845)

Benjamin F. Porter, A Collection of the Principles of the Common and Statute Law Relating to the Office of Sheriff, and the Various Duties of that Officer: Including the Law of Attachment, of Executions, and Forms of Proceedings, Particularly Adapted to the States of Alabama and Mississippi: With a Copious Index (Tuskaloosa [sic], printed by M.D.J. Slade 1846)

Harry Toulmin, The Magistrates' Assistant; Being an Alphabetical Illustration of Sundry Legal Principles and Usages, Accompanied With a Variety of Necessary Forms (published by authority) (Natchez, Miss., Samuel Terrell, Printer to the Mississippi Territory 1807)

William Russell Smith, The jurisdiction of justices of the Peace in Civil and Criminal Cases: With Forms for the Use of Executors, Guardians, Administrators, and Civil Officers: All Arranged Under the Laws of the State of Alabama, as Now in Force: With an Appendix, Adapting the book to the Use of Justices of the Peace in the State of Mississippi, with Numerous Forms for Conveyancers (Montgomery, White, Pfister & Co. 1860)[215]

George F. Webb and J.L. Power, Mississippi Manual of Legal and Business Forms: Containing Forms for Justices of the Peace, County Officers, Attorneys and Professional and Business Men Generally, in the State of Mississippi (3d ed., Jackson, Miss., Clarion Steam Book and Job Prtg. Establishment 1869)[216]

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[215] For the variant Alabama editions of this title, *see* Owen, *supra* note 43, at 805.

Case Digests

GARNETT ANDREWS, A DIGEST OF MISSISSIPPI REPORTS, VOLS. 45 TO 56 INCLUSIVE: BEING A SUPPLEMENT TO GEORGE'S DIGEST (Madison, Wis., David Atwood 1881)

L. BRAME AND C.H. ALEXANDER, A DIGEST OF THE REPORTS OF THE DECISIONS OF THE SUPREME COURT OF MISSISSIPPI: FROM VOLUME FORTY-FIVE TO SEVENTY-THREE INCLUSIVE (Nashville, Marshall & Bruce Co. 1899)

JAMES Z. GEORGE, A DIGEST OF THE REPORTS OF THE DECISIONS OF THE SUPREME COURT AND OF THE HIGH COURT OF ERRORS AND APPEALS OF THE STATE OF MISSISSIPPI, FROM THE ORGANIZATION OF THE STATE, TO THE PRESENT TIME (Philadelphia, [Penn.?], T. & J.W. Johnson and Co. 1872)[217]

J. BOWMAR HARRIS, A DIGEST OF MISSISSIPPI RAILWAY DECISIONS FROM VOL. 1 TO AND INCLUDING VOL. 71 MISSISSIPPI REPORTS (Gavelston, Press of Clarke & Courts 1894)

DANIEL HEIDELBERG, A DIGEST OF MISSISSIPPI REPORTS, VOLS. 45 TO 64 INCLUSIVE: BEING A DIGEST OF ALL THE MISSISSIPPI REPORTS NOT EMBRACED IN GEORGE'S DIGEST (Albany, N.Y., 1888)

WILLIAM C. SMEDES, A DIGEST OF THE CASES DECIDED AND REPORTED IN THE HIGH COURT OF ERRORS AND APPEALS AND THE SUPERIOR COURT OF CHANCERY OF THE STATE OF MISSISSIPPI FROM 1818 TO 1847 (Boston, C. C. Little and J. Brown 1847)

MARVIN E. SULLIVAN, A TABLE OF ALL MISSISSIPPI CASES WHICH

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[216] Owen catalogues the publication date of this third edition as 1870, which suggests either an error or a variant printing. OWEN, *supra* note 43, at 787.

[217] Owen writes, "This is more than a digest of the decisions; it is a critical commentary of the entire body of the law up to this time, as it existed in Mississippi." OWEN, *supra* note 43, at 668. Owen identified himself as a lawyer on the title page of his bibliographic work, and his praise reflected the high regard in which George's digest was held in the legal community.

HAVE EVER BEEN MENTIONED IN THE OPINIONS OF THE HIGH COURT OF ERRORS AND APPEALS AND OF THE SUPREME COURT OF MISSISSIPPI: FROM THE ORGANIZATION OF THE STATE TO THE PRESENT TIME, INCLUDING ALL THE CHANCERY REPORTS, AND ALL THE LAW REPORTS DOWN TO VOLUME 59 OF THE "MISSISSIPPI REPORTS," INCLUSIVE, SHOWING IN WHAT MANNER THE COURT MENTIONED EACH CASE, WHETHER CITED, DOUBTED, EXPLAINED, MODIFIED, CRITICISED, APPROVED, AFFIRMED, OR OVERRULED (Chicago, Callaghan & Co., 1883)

Periodicals, Reports, Pamphlets, Speeches, Lectures, Biographies

JAMES M. ARNOLD, SOME REFECTIONS ON THE SCHOOL LAWS AND EDUCATIONAL INTERESTS OF THE STATE: AN ADDRESS DELIVERED TO THE ALUMNI ASSOCIATION OF THE UNIVERSITY OF MISSISSIPPI (Columbus, Miss., Ferris & Young Printers 1881)

JOSEPH G. BALDWIN, THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI: A SERIES OF SKETCHES (New York, D. Appleton 1853)[218]

JOSEPH G. BALDWIN, THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI: A SERIES OF SKETCHES (Americus, Ga., Americus Book Co. 1853)[219]

JOSEPH G. BALDWIN, THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI: A SERIES OF SKETCHES (San Francisco, S. Whitney & Co. 1853)[220]

SOL. S. CALHOON, NEGRO SUFFRAGE (Jackson, Miss., Commonwealth Steam Print 1890)

R.B. CAMPBELL, THE STATUS OF WOMEN UNDER THE LAWS OF THE STATE OF MISSISSIPPI (n.p., n.d.) [Pamphlets in American history; Women; WO 330]

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[218] Appleton published later editions of this title in 1854, 1856, 1858, 1859, 1861, 1865, 1866, 1871, 1872, 1891, 1894 and 1898.

[219] Americus published a later edition in 1854.

[220] Whitney published later editions of this title in 1876, 1883, 1887, 1889, 1891, 1895, 1898 and 1899.

ALEXANDER M. CLAYTON, Commencement Address by the Hon. Alexander M. Clayton, LL.D., Read Before the Law-Students of the University of Mississippi, on the 26th day of June, 1860 (Oxford, Miss., 1860)

CONSTRUCTION OF THE 3D ARTICLE, 26TH SECTION, OF THE CONSTITUTION OF THE STATE OF MISSISSIPPI, AS TO THE ELIGIBILITY OF A MEMBER OF THE GENERAL ASSEMBLY TO A SEAT IN THE SENATE OF THE UNITED STATES: TO ME IT APPEARS, THAT OUR LEGISLATORS SOMETIMES TRANSGRESS NOT ONLY THE NATURAL, BUT THE WRITTEN BOUNDS OF THEIR POWER: SMITH ON GOVERNMENT: BY REPRESENTATIVES FROM WILKINSON (Woodville, Miss., printed by Samuel T. King 1825)

THE ELECTION LAW: CONSTITUTIONALITY THEREOF MAINTAINED AN OPINION OF ONE OF THE MOST EMINENT CONSTITUTIONAL LAWYERS IN THE UNITED STATES ON THE ELECTION LAW OF MISSISSIPPI (n.p., 1871)

ROBERT VIRGIL FLETCHER, EDWARD MAYES: THE IDEAL LAWYER (address prepared by vice president and general counsel, Association of American Railroads, delivered before University of Mississippi Law School) (n.p., n.d.)

HENRY STUART FOOTE, THE BENCH AND BAR OF THE SOUTH AND SOUTHWEST (St. Louis, Soule, Thomas & Wentworth 1876)

JAMES Z. GEORGE, LETTERS OF HON. J.Z. GEORGE ON THE LEGAL OBLIGATIONS AND INDEBTEDNESS OF THE STATE TO THE AGRICULTURAL AND MECHANICAL COLLEGE, ALCORN UNIVERSITY AND INDUSTRIAL FEMALE INSTITUTE: THE ORIGIN AND OBJECT OF THE AGRICULTURAL LAND SCRIP FUND (Jackson, Miss., Clarion Steam Prtg. Establishment 1887)

WILEY P. HARRIS, ADDRESS TO THE GRADUATING CLASS IN THE DEPARTMENT OF LAW, UNIVERSITY OF MISSISSIPPI, JUNE 23D, 1869 (Jackson, Miss., Clarion Book and Job Prtg. Establishment 1869)

JAMES T. HARRISON, A BRIEF ON THE PRESENT LAW OF HOMICIDE (Columbus, Miss., "Mississippi Democrat" Power Press 1860)

R.A. Hill, Lectures Delivered by Hon. R.A. Hill, to the Law Class of the University of Mississippi, Upon the Jurisdiction and Practice in the Federal Courts: Session 1877-'78 (Jackson, Miss., C. Winkley, Printer 1878)

John Hunter, Proceedings of the Bar, and of the Supreme Court, State of Mississippi, On the Occasion of the Death of the Late Hon. George L. Potter, Including Address of Rev. John Hunter, Resolutions, Etc. (Jackson, Miss., Charles Winkley, Book and Job Printer 1877)

John Ker, A Brief History of an Attempt During the Last Session of the Legislature, in 1841, to Interfere with the Judgments of the Courts, in Relation to the Wills of the Late Captain Ross and Mrs. Reed (Natchez, Miss., printed by Baldwin & Risk 1842)

James D. Lynch, The Bench and Bar of Mississippi (New York, E.J. Hale & Son 1881)

Edward Mayes, Lucius Q.C. Lamar: His Life, Times, and Speeches: 1825-1893 (Nashville, Methodist Episcopal Church South 1896); (2d ed. 1896)

Cowles Mead, Letter from Cowles Mead, Speaker of the House of Representatives of the Mississippi Territory, Enclosing a Copy of a Presentment against Harry Toulmin Judge of the Superior Court for Washington District in Said Territory: Made by the Grand Jury of Baldwin County (Washington City, printed by R.C. Weightman 1811)

Mississippi Attorney General's Office Biennial Report of the Attorney General of the State of Mississippi, 1893-.[221]

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[221] *See* 5 Pimsleur's Checklists Basic American Legal Publications, *supra* note 7 (stating that reports began to be published regularly in 1893 and were published in 1893, 1895, 1898 and 1899). An attorney general report was also printed in 1872, and one opinion was included in the House Journal for the January 1846 session. *Id.*

MISSISSIPPI BAR ASSOCIATION, MINUTES OF THE MISSISSIPPI BAR ASSOCIATION: AT ITS ANNUAL MEETING (Meridian, Miss., Daily News Steam Press [1887-1890s])[222]

MISSISSIPPI BAR ASSOCIATION, REPORT OF THE ANNUAL MEETING OF THE MISSISSIPPI BAR ASSOCIATION (Jackson, Miss., 1886-1892)

MISSISSIPPI BAR ASSOCIATION, PROCEEDINGS OF THE MISSISSIPPI BAR ASSOCIATION AT ITS ANNUAL MEETING, HELD JANUARY 7, 1892 (Jackson, Miss., State Ledger Prtg. 1892)

Mississippi Secretary of State, BIENNIAL REPORT OF THE SECRETARY OF STATE, TO THE LEGISLATURE OF MISSISSIPPI FOR THE YEARS 1896 AND 1897 (printed by authority) (Jackson, Miss., the Clarion-Ledger Print. 1897)[223]

Thomas M. Owen, *Federal Courts, Judges, Attorneys, and Marshals in Mississippi, 1798-1898*, 2 PUBL. MISS. [STATE] HIST. SOC'Y 147 (1899)

Penitentiary. REPORTS OF THE INSPECTORS, SUPERINTENDENT, PHYSICIAN AND CHAPLAIN, FOR FISCAL YEAR ENDING OCT. 31, 1857 (Jackson, Miss., 1857)

Penitentiary. BIENNIAL REPORT OF THE SUPERINTENDENT, PHYSICIAN, AND CHAPLAIN OF THE MISSISSIPPI PENITENTIARY, TO THE LEGISLATURE OF MISSISSIPPI, FOR THE YEARS 1880-81 (printed by authority) (Jackson, Miss., J.L. Power 1882)

GEORGE POINDEXTER, MR. POINDEXTER'S MOTION, FOR AN IMPEACHMENT OF JUDGE BRUIN, OF THE MISSISSIPPI TERRITORY (Washington City, A. & G. Way, Printers 1808)

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[222] Owen catalogues the proceedings' third annual meeting (1888) but remarks that there were issues for others that he did not see. OWEN, *supra* note 43, at 648. These proceedings contained legal resources. *Cf.* Edward Mayes, *A Glance at the Fountains of Our Land Titles*, 1887 MINUTES OF MISS. STATE BAR ASSOC. 5-14; Edward Mayes, *The Administration of Estates in Mississippi*, 1891 MINUTES OF MISS. STATE BAR ASSOC. 52-121, *in* OWEN, *supra* note 43, at 762.

[223] Cataloged thus by Owen who notes that there were also reports for other years. OWEN, *supra* note 43, at 800.

[Pray] Publius Rutilius Rufus, Notes to the Revised Statutes of the State of Mississippi (Jackson, Miss., printed by G.R. & J.S. Fall, State Printers 1836)

Green Berry Raum, The Existing Conflict Between Republican Government and Southern Oligarchy (Washington, 1884)

Reuben O. Reynolds. In Memoriam: Proceedings of the Aberdeen Bar Association, Commemorative of the Life and Character of Reuben O. Reynolds (Jackson, Miss., Clarion-Ledger Prtg. Establishment 1888)

William L. Sharkey, Commencement Address Delivered Before the Law Students of the University of Mississippi, on the 5th Day of July, 1859 (Oxford, Miss., 1859)

William L. Sharkey, Proceedings of a Meeting of Citizens of Central Mississippi, in Relation to the Slavery Question: Also the Proceedings of the State Convention, on the Same Subject, Held at the City of Jackson, October, 1849 (published by order of the legislature) (Jackson, Miss., Fall & Marshall, State Printers 1850)

The Southern Law Times (Chattanooga, Commercial Prtg. Co., Publishers 1885-) (weekly periodical containing decisions of the Supreme Courts of Tennessee and Mississippi with articles, notes and book reviews)

[Starkville Bar], Rates of Minimum Charges of the Starkville Bar (As Revised and Adopted January, A.D., 1888): To Be Observed by Ourselves and Those Practicing in the Various Courts of Our Town and County (Starkville, Miss., A.G. O'Brien & Son 1888)

William F. Stearns, A Preliminary Lecture, Delivered Before the Law-Students of the University of Mississippi, on the 14th of September, 1857 (Oxford, Miss., 1857)

William F. Stearns, Circular Letter to the Mississippi Bar (Oxford, Miss., 1858)

Alfred H. Stone, The Early Slave Laws of Mississippi Being Some Brief Observations Thereon, in a Paper Read Before the Mississippi Historical Society, at a Meeting Held in the City of Natchez, Apr. 20th-21st, 1899 ([Oxford, Miss.?], 1899)

Augustus Q. Walton, A History of the Detection, Conviction, Life and Designs of John A Murel [sic], the Great Western Land Pirate: together with His System of Villainy and Plan of Exciting a Negro Rebellion (Athens, Tenn., Journal Office 1835)

George Winchester, An Address to the People of Mississippi Upon a Question; the Decision of Which May Involve the Life, Liberty, Reputation and Property of Every Individual in the State (Natchez, Miss., printed at the Courier office 1833)

William Wirt, Rights of the States: A Reply To, and Review of an Opinion, of the Hon'ble William Wirt (Herewith Re-Published) Entitled, Rights of the Indians, Upon the Question, "Has the State of Georgia a Right to Extend her Laws over the Cherokees, within the Cherokee Territory?": By a Member of, the Mississippi Bar ([Woodville, Miss.?], Wm. A.A. Chisholm, printer 1830)

International[224]

Constitution of the United Mexican States; the General Colonization Law, and the Colonization Law of the State of Cohuila and Texas (C. Chaplin trans., Natchez, Miss., Grissam, Moss & Co. 1826)

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[224] This bibliography omits many works relating to treaties with Native Americans. Owen provides numerous citations. *See* Owen, *supra* note 43, 663-64, 690, 731-32. Likewise, it omits the early travel literature, some of which includes accounts of the customs and laws of Native Americans. *See id.* at 781 (cataloging 1805 French title that treats customs and civil practices of Native Americans in the region).

APPENDIX IV
PROPOSED CITATION FORMS

CONSTITUTIONS[225]

MISS. CONST. of 1817, art. V, § 1[226]
MISS. CONST. of 1832, art. IV, § 1
MISS. CONST. of 1869, art. VI, § 1
MISS. CONST. art. VI, § 144

STATUTORY MATERIALS[227]

CODES AND STATUTORY COMPILATIONS

REV. CODE MISS. [POINDEXTER'S CODE] ch. 1, § 1 (1823)[228]

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[225] The citation of current and superseded constitutions is governed by specific *Bluebook* rules and examples. THE BLUEBOOK, *supra* note 2, at 75.

[226] The proposed citation form (including the superfluous comma) is taken from the example provided in *The Bluebook*. *Id.* at 75 ("ARK. CONST. of 1868, art. III § 2 (1873)").

[227] *The Bluebook* prescribes citing statutes no longer in force to one of the following, in the order listed: the current official or unofficial code, the last edition of the official or unofficial code in which they appeared, the session laws or a secondary source (in that order). It also requires that the fact of repeal or amendment be stated parenthetically. THE BLUEBOOK, *supra* note 2, at 77. But it seems silly to require the statement of repeal to be stated continuously in historical discussions of antiquated laws, and the *Mississippi Law Journal* has not done so. For example, it did not insert a citation to the thirteenth amendment into every reference to the slave code in Judge Mills's historical study of slave laws in the state. *Cf.* Mills, *supra* note 1. It should be noted, moreover, that most discussions of old statutes occur in historical contexts and are presumably governed by *The Bluebook* exception: "The historical fact of enactment, amendment, or repeal should be cited to the session laws. A parenthetical reference to the current version . . . *may* be added . . ." THE BLUEBOOK, *supra* note 2, at 78 (emphasis added).

The Bluebook's detailed rules for citing codes, *id.* at 78-81, actually all pertain to *current* codes. *Cf. id.* (rubric for discussion of citing all codes is "Current Official and Unofficial Codes"). These rules can be applied to historic codes, but doing so may obscure the historical nature of the material cited. For that reason, this Article proposes alternative citations of some of the older codes (especially for unofficial ones) that more clearly signal their historic or unofficial status.

[228] If this were a current code, it might be cited: MISS. REV. CODE ch. 1, § 1 (Poindexter 1823). *See* THE BLUEBOOK, *supra* note 2, at 79-80. This article proposes inserting in brackets the designation of this code as "Poindexter's Code" for the first and subsequent citations because the code was traditionally known and identified as Poindexter's Code by Mississippi courts and practitioners. *The Bluebook*

MISS. LAWS 1824-1838, at 531 (1838) (Act of Dec. 18, 1833 directing the mode of publishing the acts of the legislature)[229]
DIG. LAWS MISS. ch. 36, § 1 (Fox Alden & Van Hoesen 1839)[230]
MISS. CODE [HOWARD & HUTCHINSON'S CODE] ch. 24, § 1 (1840)[231]
MISS. CODE [HUTCHINSON'S CODE] ch. 25, art. 1, § 1 (1848)[232]
MISS. REV. CODE ch. 10, art. 1 (1857), *or* MISS. REV. CODE ch. 11, § 1 (1857)[233]
MISS. REV. CODE § 196 (1871)[234]
MISS. REV. CODE § 279 (1880)[235]

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citation method does not unambiguously identify Poindexter as the codifier rather than the publisher.

[229] This source presents bibliographic challenges because, though it was published as an appendix to the code and contained laws from multiple sessions, its format and title page make it look like a volume of the session laws. As an unconsolidated compilation, *The Bluebook* rules suggest it should be cited as: MISS. UNCONSOL. LAW at 531 (1838). This format, however, does not adequately identify the title of the work and would frustrate researches and librarians. The proposed citation reverses the nouns in the original title (which is "Laws of Mississippi") to conform to all the examples provided by *The Bluebook* for codes and statutory compilations. *See* THE BLUEBOOK, *supra* note 2, at 77-80. The parenthetical indication of the specific act is necessary to avoid ambiguity when more than one act appears on a page. The comma and "at" designation for the page are required to avoid confusion. *Id.* at 34-35.

[230] The proposed citation shortens the full title A DIGEST OF THE LAWS OF MISSISSIPPI COMPRISING ALL THE LAWS OF A GENERAL NATURE, INCLUDING THE ACTS OF THE SESSION OF 1839. If this were a current unofficial code, it would be cited: MISS. CODE ch. XXXVI, § 1 (Fox Alden & Van Hoesen 1838). *See* THE BLUEBOOK, *supra* note 2, at 78-79. Although the code employed Roman numerals for chapter numbers, this Article proposes citing chapter numbers by Arabic numerals.

[231] If current, this compilation would pose a problem for citation rules since it appears to be a code but might more precisely be considered a hybrid of a code and a compilation of the 1838 reprint of unconsolidated laws. The proposed citation form assumes the hybrid is itself an unofficial code (but certainly not a revision). For the reason for identifying the codifiers in brackets, see *supra* note 228. This code also employed Roman numerals, but this Article proposes identifying chapters by Arabic numerals. *See supra* note 230.

[232] If current, this official code would be cited: MISS. CODE ch. 2, art 8, § 1 (1848). For the reason for identifying the codifiers in brackets, see *supra* note 228. This code also employed Roman numerals, but this Article proposes identifying chapters by Arabic numerals. *See supra* note 230.

[233] Some chapters of this code are subdivided into chapters while others are subdivided into articles. *See supra* note 71 and accompanying text. This code also employed Roman numerals. *See supra* note 228.

[234] Because sections in this code are numbered sequentially, it is unnecessary to provide the chapter and article for the section.

[235] As with the code of 1871, it is unnecessary to provide the chapter number

MISS. REV. CODE ANN. § 4162 (1892)[236]

SESSION LAWS

Act of Feb. 27, 1836, Jan.-Feb. 1836 Miss. Laws 215-16 (incorporating Tombigbee Rail-Road Company)[237]

Act of Feb. 26, 1856, ch. 104, Jan.-Mar. 1856 Miss. Laws 258 (relating to limited partnerships)[238]

Act of Jan. 26, 1857, ch. 12, Dec. 1856-Feb. 1857 Miss. Laws 84 (establishing State Library)[239]

Act of Dec. 2, 1858, ch. 22, § 9, Nov.-Dec. 1858 Miss. Laws 80 (authorizing Smith county school children to attend school in adjacent township when more convenient and authorizing trustees to pay tuition upon proof of attendance)[240]

Act of Apr. 28, 1897, ch. 16, Apr.-May 1897 Miss. Laws 17 (act creating office of Road Commissioner)

REPORTERS

Supreme Court

Decisions of the Mississippi Supreme Court and High Court of Errors and Appeals are adequately covered by specific *Bluebook* rules and examples.[241]

Chancery Court

Martin v. Broadus, 1 Miss. Ch. (Freeman) 35 (1839-1843)[242]

Martin Pleasants & Co. v. Glasscock, 1 Miss. Ch. (S. & M.) 1 (1843)[243]

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for the section, because the sections are numbered sequentially.

[236] See *supra* note 227.

[237] This volume does not yet give chapter numbers for acts. *See supra* note 49.

[238] This format follows the general form: act of [date], ch. [number], [month and year] Miss. Laws [page] ([optional description of contents of statute]). *See* THE BLUEBOOK, *supra* note 2, at 81-82.

[239] This volume employs Roman numerals for chapter numbers, but the citation adopts Arabic for consistency and ease of reference.

[240] This example displays a method of citing to a specific section of the act. As in the previous example, the citation gives the chapter number in Arabic numerals instead of the Roman numerals employed in the volume. Although this volume's title page states that the session was held November 1858, its contents clearly reveal that the session lasted until December. (The actual publication date for the volume was 1859 but need not be indicated.); *see supra* note 51.

[241] THE BLUEBOOK, *supra* note 2, at 211-12.

[242] The fact that the reporter omitted case dates, and the fact that Chancellor Buckner sat for the term 1839-1845, makes it necessary to identify each case by the inclusive dates of cases in the volume.

[243] The designation of the reporters Smede and Marshall by "S. & M." is al-

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ready adopted by *The Bluebook* for supreme court reporters published from 1843 to 1850. See The Bluebook, *supra* note 2, at 212.

COMMENTS

A Constitutional Analysis of Random Vehicle Searches at Airports

On February 7, 2003, in response to "threats and information" which caused the Homeland Security Threat Advisory level to rise from yellow to orange,[1] the Transportation Safety Administration (TSA) announced several new security measures to be taken at all major airports, including increasing the number of random vehicle searches in parking and terminal access areas.[2] Many cities balked at the idea, noting concerns about the constitutionality of such procedures.[3] The TSA quickly defended its position, noting that when certain precautions are taken, several federal courts have allowed such searches for reasons of public safety; most of the objecting airports eventually complied.[4] The searches are typically conducted in a fashion similar to sobriety or license checkpoints or even border crossings which see thousands of vehicles per day.[5] In the most common form, signs are posted and checkpoints are established far enough away to allow drivers to avoid the inspection by not entering the terminal area.[6] All vehicles are required to slow down while officers visually inspect them, with certain autos being stopped for a thorough search inside and out.[7] Although the searches are termed random, that is not always the practice as some airports search "all vans, trucks and SUVs, and randomly selected cars."[8] Officials have refused to outline how vehicles are se-

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[1] The levels begin at green (low), progress to blue (guarded), yellow (elevated), orange (high) and crescendo with red (severe risk of terrorist attack). U.S. Department of Homeland Security, *Homeland Security Advisory System*, http://www.dhs.gov/dhspublic/display?theme=29 (last visited June 18, 2003). Each level describes the type and extent of precautions citizens should take in response to a perceived terrorist threat. *Id.* Many citizens and government agencies find the system confusing and uninformative. *See Communities Ask for Details on Color-Coded Terror Alerts*, CLARION-LEDGER (Jackson, Miss.), July 18, 2003, at 10A (noting fiscally struggling communities want more information in order to better tailor responses to color-coded alert system, that "[e]very community cannot be equally vulnerable at the same time" and federal government should pay for increased security measures).

[2] Transportation Safety Administration (TSA) Press Announcement, http://129.33.119.130/public/display?theme=44&content=490 (last visited May 2, 2003); Rachel La Corte, *Florida Checks Security for Holiday Weekend*, BRADENTON HERALD (Fla.), May 22, 2003, *available at* 2003 WL 18131406. Other precautions include "renewed parking restrictions, the suspension of off-airport check-in, and increased law enforcement patrols." *"Code-Orange" Threat Level Triggers Restrictions at Airports*, AIRPORTS Vol. 20, No. 6, Feb. 11, 2003, *available at* 2003 WL

9122842. The TSA was created in the aftermath of the tragic events of September 11, 2001, and "tasked by the Congress to establish and deploy a qualified and fully trained federal security workforce in all of the nation's 429 commercial airports by November 19, 2002." TSA Progress Report, Nov. 18, 2002, http://129.33.119.130/public/display?theme=67&content=361 (last visited May 2, 2003). *See also* The Aviation and Transportation Security Act §109, 49 U.S.C. Chs. 1-7, 401-501 (2001).

[3] Sara Kehaulani Goo & Carrie Johnson, *Police Searching Cars at Random Outside Airports*, WASH. POST, Feb. 19, 2003 at A1. At airports across the nation, managers, civil liberties groups and legal scholars questioned the constitutionality of the searches, which are conducted by local police but imposed by the federal government, under both the Fourth and Tenth Amendments. *Id.* Further, the Seattle-Tacoma International Airport refused to comply because the searches conflicted with state search and seizure laws. *Id*; Bryon Okada, *Passenger-Screening System Many Months Away*, FORT WORTH STAR-TELEGRAM, Mar. 29, 2003, *available at* 2003 WL 17386765.

[4] Goo & Johnson, *supra* note 3. All three major Washington, D.C. airports were seemingly convinced and began "randomly inspecting cars and trucks that drop off or pick up passengers. They also [started] searching delivery trucks and other vehicles entering the airport." *Id.* The TSA vowed to work with local jurisdictions in which the searches conflict with state search and seizure laws. *Id.*

[5] *Id.*

[6] *Id.* Instead travelers might choose to leave their vehicle in a parking garage and walk to the terminal. Christopher Calnan, *No More Random Car Searches at Jacksonville, Fla., Airport*, FLA. TIMES-UNION, Apr. 22, 2003, *available at* 2003 WL 19369991.

[7] Calnan, *supra* note 6.

[8] Shane Hoover, *War Brings Tighter Airport Security*, OBSERVER-DISPATCH

lected or even how many vehicles have been inspected.[9]

On April 16, 2003, the Bush administration lowered the threat level to yellow, and random vehicle searches were largely suspended.[10] The cost of the searches varied by airport, ranging from $3825 per day at the Jacksonville, Florida International Airport,[11] to a projected $1,000,000 per year at Tampa International,[12] to $180,000 per month at Hartsfield International in Atlanta, Georgia.[13] Although federally mandated, local jurisdictions have been responsible for most of the costs associated with the increased security.[14]

While this comment will address random vehicle searches

(N.Y.), Mar. 28, 2003, *available at* 2003 WL 13287026. In the same article, Commissioner of Aviation Anthony J. Mancuso said the searches take, at most, eight minutes. *Id.*

[9] Repeated requests over the course of several months by the author for any information related to these searches, even information which could in no way detrimentally affect the ongoing operation of such searches, such as legal memorandum, were refused. At the time of printing, the author still had not received such information despite having filed a Freedom of Information Act request with the TSA; *see also* Calnan, *supra* note 6. This obviously makes a determination of the effectiveness of the searches impossible.

[10] Eunice Moscoso, *U.S. Lowers Alert To Yellow But Urges Caution*, ATLANTA J.-CONST., Apr. 17, 2003, at A3; Calnan, *supra* note 6; Daniel de Vise & Jennifer Maloney, *Reactions Muted To Lowering of Terror Alert*, MIAMI HERALD, Apr. 17, 2003, *available at* 2003 WL 17411120. *But see* Dan Weikel, *Orange County Fewer Searches as JWA Roads Reopen*, L.A. TIMES, Feb. 28, 2003, *available at* 2003 WL 2388399 ("Although random searches outside terminals have been halted, deputies will continue to inspect vehicles entering the airport's parking facilities."). The Department of Homeland Security (DHS) raised the terror alert to orange on May 20, 2003, for the third time in three months. La Corte, *supra* note 2; John Mintz, *U.S. Lowers Level of Terror Alert From Orange to Yellow; Intelligence Suggests Less Risk of Attack*, WASH. POST, June 1, 2003, at A4. It was once again lowered to yellow following the uneventful Memorial Day weekend. Mintz, *supra.*

[11] Calnan, *supra* note 6. The inspections were initially conducted by National Guard troops who were later replaced by private security guards. *Id.* The airport was able to stop inspecting vehicles entering the parking garage after a blast analysis showed that an explosion in the garage would not damage the terminal. *Id.*

[12] Jean Heller, *Airport May Put Services on Hold*, ST. PETERSBURG TIMES, Apr. 4, 2003, *available at* 2003 WL 16016076. This figure includes the costs of all new security measures, including random searches of vehicles not reimbursed by the federal government. *Id.*

[13] Moscoso, *supra* note 10. The expenses were for labor and signage. *Id.*

[14] Kimberly Johnson, *Code Orange Goes Smoothly, Funding Still An Issue*, AIRPORTS, Vol. 20, No. 21, May 27, 2003, *available at* 2003 WL 9123338.

performed in the context of airports, the reader should be aware that they are not limited exclusively to airports. For instance, random vehicle searches are commonplace outside large tourist attractions such as the Hoover Dam.[15] They have even been considered for shopping malls.[16]

I. DETERMINING THE PROPER TEST

Because the Supreme Court has never dealt with random vehicle searches within the special context of airports, there exists no particularized analysis under which to examine their constitutionality. Instead we must seek to combine the case law dealing with searches within airports, thus incorporating the special circumstances of that industry, with the cases dealing with automotive searches and seizures.

A. *Administrative Searches*

In *United States v. Davis*,[17] the Ninth Circuit held that the appropriate standard for evaluating searches of passengers and carry-on luggage under the Fourth Amendment is equivalent to the standard used for "administrative" searches.[18] The key to this theory is a balancing of (1) the gravity of public concern served by the search or seizure, (2) the degree to which the search or seizure advances the public's interest and (3) the degree to which the search or seizure interferes with individual liberty.[19]

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[15] Paula Szuchman, *Across U.S., It's Stars, Stripes and Lines*, WALL ST. J. EUR., May 30, 2003, *available at* 2003 WL-WSJE 3875861. This article serves as a travel guide for foreign tourists, but instead of focusing on what there is to see and do at particular locales, it is devoted to ranking the security "hassle factor" of various attractions. *Id.*

[16] Malcom Brenner, *Port Charlotte, Fla., Mall Drops Random Search Idea*, KNIGHT-RIDDER TRIB. BUS. NEWS (Fla.), Mar. 26, 2003, *available at* 2003 WL 17486621. The mall dropped the proposed security policy one day after announcing the policy. *Id.* The increased security was a direct response to federal homeland security guidelines. *Id.* The renunciation came after concerns regarding the legality of searching private property and the threat of libel suits were raised. *Id.*

[17] 482 F.2d 893 (9th Cir. 1973).

[18] *Davis*, 482 F.2d at 908. The court said that the proper standard was enunciated "in a series of Supreme Court cases," including Camara v. Municipal Court, 387 U.S. 523 (1967), and "in two Court of Appeals decisions applying these precedents." *Id.* These cases dealt with closely regulated industries, routine building inspections pursuant to safety inspections, the conditional granting of welfare benefits, inspection of luggage to prevent exportation of "plant pests and diseases" and admission to a federal building upon submission to a search of personal effects. *Id.* at n.40.

To be classified under the more lenient administrative search standard, contrasted against the normal requirement of individualized suspicion, searches must be "part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of [a] crime."[20] Additionally, administrative searches are valid only if they recognize the right of a person to avoid the search.[21] Thus, administrative searches are able to avoid the stigma noted in *Terry v. Ohio*[22] because the person to be searched is not subjected to anything different or more intrusive than all his flying accomplices, *all of whom are searched.*[23] Furthermore, administrative searches significantly diminish the intrusion upon an individual by virtue of the advance notice they provide.[24]

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[19] Brown v. Texas, 443 U.S. 47, 50-51 (1979). In this case the Court was dealing with the brief seizure of person, who was walking down an alley in an area known for drug trafficking, for the purposes of identification. *Brown*, 443 U.S. at 48-49. When the man refused to provide identification, in violation of a Texas statute, the officer arrested him. *Id.* at 49. Finding that the officer had no objectively reasonable suspicion that the man was or had committed a crime, the Court reversed the man's conviction. *Id.* at 53. The Court went on to hold that the balance between the public interest in preventing crime and the citizen's right to personal freedom and privacy tilts in favor of freedom from police interference in the absence of any basis for suspicion of misconduct. *Id.* at 52.

[20] *Davis*, 482 F.2d at 908; *see also* Griffin v. Wisconsin, 483 U.S. 868, 873 (1987). While the Court acknowledged the "practical consequence" that contraband will be discovered during these searches, it noted the "obvious danger, nonetheless, that the screening of passengers and their carry-on luggage for weapons and explosives will be subverted into a general search for evidence of a crime. If this occurs, the courts will exclude the evidence obtained." *Davis,* 482 F.2d at 908-09 (footnote omitted); *see also* City of Indianapolis v. Edmond, *infra* notes 53-58 and accompanying text.

[21] *Davis*, 482 F.2d at 910-11; United States v. Meulener, 351 F. Supp. 1284, 1289-90 (C.D. Cal. 1972) (finding search of suitcase "constitutionally impermissible [when] the defendant was not given the opportunity to decline to submit to the search"); *see also* Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 452 (1990) (reciting lower court determination that subjective intrusion was increased by absence of proof that drivers were notified of option to U-turn to avoid checkpoint); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 675 n.3 (1989) (requiring that "the passenger is given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air"). However, this is not a universally accepted view. In United States v. Skipwith, 482 F.2d 1272, 1281 (5th Cir. 1973), Judge Aldrich, in a portion of his dissenting opinion adopted by the majority, noted that "the very fact that a safe exit is available if apprehension is threatened, would, by diminishing the risk, encourage attempts" and "would constitute a one-way street for the benefit of a party planning airplane mischief, since there is no guarantee that if he were allowed to leave he

Ingrained in the administrative search theory is the so-called "special needs" doctrine set forth in *New Jersey v. T.L.O.*[25] In *T.L.O.* the Court upheld the warrantless search of

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might not return and be more successful." However, not everyone is convinced. *See* WAYNE R. LAFAVE, 4 SEARCH AND SEIZURE § 10.6 (c) (3d ed. updated 2003) (remarking that "[C]ompared to the degree of additional intrusiveness that compulsory searches involve, however, this possibility seems so slight as to be inconsequential. The risk of successful hijacking is not enhanced" by allowing someone to drop out of line for simple reason that all passengers must submit to search each time they attempt to board).

[22] 392 U.S. 1 (1967).

[23] *See* People v. Hyde, 524 P.2d 830, 843 (Cal. 1974) (Wright, C.J., concurring). Chief Justice Wright wrote that:

> [a] third feature of public facility screening searches which operates to soften the impact of their intrusion upon individual privacy is the fact that all citizens who wish to use the particular facility involved are subject to the same screening procedures. No one is singled out for different treatment from his fellow travelers. There is no social stigma associated with airport screening inspections and the individuals who must submit to these searches do not run the risk of public ridicule or suspicion.

Hyde, 524 P.2d at 843 (Wright, C.J., concurring). In *Davis*, the court noted that "pre-boarding screening of *all* passengers and carry-on articles . . . is reasonably necessary to meet the need" because "there is no foolproof method of confining the search to the few who are potential hijackers." *Davis*, 482 F.2d at 910 (emphasis added). Likewise, in *Hyde*, the Court noted that "no unerringly accurate procedure has been devised to restrict predeparture searches only to those who are potential hijackers." *Hyde*, 524 P.2d at 835. In Barrett v. Kunzig, 331 F. Supp. 266, 274 (M.D. Tenn. 1971), the court noted that "[b]ecause everyone carrying the enumerated parcels is required to have them inspected, the inspection is not accusatory in nature and the degree of insult to the entrant's dignity is minimal. Thus it cannot be said that a finger of suspicion is unfairly or arbitrarily being pointed at an individual as falling within a 'highly selective or inherently suspect' group." *See also* R.I. Def. Attorneys Ass'n v. Dodd, 463 A.2d 1370, 1372 (R.I. 1983) (sustaining nonaccusatory and minimally intrusive courthouse security measures).

[24] *Hyde*, 524 P.2d at 842 (Wright, C.J., concurring); *see also* United States v. Biswell, 406 U.S. 311, 316 (1972) (holding warrantless search of gun dealer's store constitutional because he was part of "pervasively regulated business" and knew his business records and inventory were subject to effective inspection); Wyman v. James, 400 U.S. 309, 313 (1971) (finding six days advance notice of home visit of welfare recipient factor in reasonableness); *Davis,* 482 F.2d at 914.

[25] 469 U.S. 325, 351 (1985) (Blackmon, J., concurring). It was later adopted in

a student's purse which resulted in delinquency charges as reasonable under the Fourth Amendment.[26] In reaching its decision, the Court balanced the need to search against the invasion it entailed.[27] The special needs doctrine has largely been circumscribed to random, suspicionless drug testing, inspection of closely regulated industry for purposes other than traditional law enforcement activities and has centered around a lowered expectation of privacy, minimal intrusion, neutral standards for application and an overriding government interest unrelated to the discovery of evidence of a crime.[28] Thus,

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O'Connor v. Ortega, 480 U.S. 709, 720 (1987) (plurality opinion) and *Griffin*, 483 U.S. at 873.

[26] *T.L.O.*, 469 U.S. at 333. The Court first determined that public school administrators and faculty were state actors for the purposes of the Fourteenth Amendment. *Id.* at 334.

[27] *Id.* at 338-39; *see also* Camara v. Municipal Court, 387 U.S. 523, 534-36 (1967). In *Camara*, the Court found "the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures," and thus held that probable cause "must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." *Camara,* 387 U.S. at 535-36, 538. The Court also noted that "reasonableness is still the ultimate standard" and twice recognized that the building inspections were not "aimed at the discovery of evidence of crime." *Id.* at 537, 539. *Camara* would prove to be a "fountainhead" for departures from the requirement of individualized suspicion. Thomas K. Clancy, *The Role of Individualized Suspicion In Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 548 (1995).

[28] Bd. of Educ. v. Earls, 536 U.S. 822, 830-38 (2002). In *Earls*, the Court authorized random drug testing of students engaged in extracurricular activities because of concerns for student health, preventing drug use and the role model effect, and because schools possess custodial and tutelary responsibilities which by necessity reduce student expectation of privacy. *Earls*, 536 U.S. at 830-38. Also important to the Court's decision was the minimal intrusion upon the person's privacy accomplished by a very rigid and protective testing and disclosure procedure. *Id.* at 832-33; *see also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995) (permitting suspicionless urinalysis testing of student athletes on grounds of preventing injuries and role model effect); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 679 (1989) (ruling drug-testing program for certain U.S. Customs agents constitutional because testing program was not "designed to serve the ordinary needs of law enforcement"); Skinner v. Railway Labor Executives' Assoc., 489 U.S. 602, 616-18 (1989) (allowing suspicionless drug testing of private railway employees following accidents or particular safety violations); Griffin v. Wisconsin, 483 U.S. 868, 880 (1987) (upholding reasonable grounds standard instead of probable cause for search of probationer's home);

its application to random vehicle searches, which are usually conducted by law enforcement personnel who will certainly take note of any wrongdoing, is highly suspect.[29]

B. Vehicle Checkpoints

While the Supreme Court has upheld vehicle checkpoints as administrative searches,[30] a separate discussion is warranted because of several particular and unique factors which weigh heavily in the Court's balancing test. In analyzing the validity of checkpoint programs, the Court has consistently applied the *Brown*[31] test which balances the importance of the governmental interest, the effectiveness of the checkpoint in furthering that interest and the degree of intrusion upon the individual.[32] The manning authorities stopped or inspected all vehicles at each type of checkpoint listed below.

United States v. Biswell, 406 U.S. 311, 317 (1972) (warrantless search of gun dealer's storeroom did not violate Fourth Amendment); Wyman v. James, 400 U.S. 309, 318-324 (1971) (stating home visit required by family assistance program was not search under Fourth Amendment and even if it had some characteristics of search would not be unreasonable because of advance notice and public policy determinations). The Court in these cases stressed that the governmental interest was unrelated to normal law-enforcement and in most cases the results were not disclosed to the police.

[29] It is strenuously emphasized that in each of these cases the Court was analyzing special needs beyond normal law enforcement, and, in most cases, the results were not disclosed to the police. *See* Ferguson v. City of Charleston, 532 U.S. 67, 79-80 (2001) (invalidating program of performing drug tests on pregnant patients because "special needs" in approved programs were nothing more than normal law enforcement interests); City of Indianapolis v. Edmond, 531 U.S. 32, 42, 43 (2000) (invalidating drug interdiction checkpoints whose primary purpose was indistinguishable from general interest in crime control). Instrumental to the decisions in these cases was a lowered expectation of privacy, a minimally intrusive testing program and overriding governmental interest and efficacy. *Charleston,* 532 U.S. at 78. Perhaps more importantly, none of the cases involving a vehicle allowed a search to take place but instead were limited to seizures, a less intrusive action. *See infra* Part III.

[30] Brian L. Porto, Annotation, *Validity of Police Roadblocks or Checkpoints for Purposes of Discovery of Illegal Narcotics Violations*, 82 A.L.R. 5th 103 (2000).

[31] Brown v. Texas, 443 U.S. 47 (1979).

[32] *Sitz*, 496 U.S. at 449-50; *Brown*, 443 U.S. at 51; Theresa A. O'Loughlin, *Guerillas In the Midst: The Dangers of Unchecked Police Powers Through the Use of Law Enforcement Checkpoints*, 6 SUFFOLK J. TRIAL & APP. ADVOC. 59, 64-71 (2001) (discussing each factor of *Brown* test).

1. International Border Searches

Individuals seeking to prove the constitutionality of random vehicle searches and seizures will find little refuge in the line of cases dealing with searches at an international border.[33] First and foremost, border checkpoints are based solely on the federal government's duty to protect national sovereignty from legally excludable persons and things.[34] Second, the standard of "reasonableness is qualitatively different at the international border" than in any other location.[35] Finally, the Court has explicitly struck down the practice of randomly stopping vehicles, even when near the border.[36]

Some support appears to come from *United States v. Martinez-Fuerte*,[37] which allowed the Border Patrol, after routinely stopping or slowing all automobiles at a fixed, permanent checkpoint, to selectively refer some motorists for a secondary, more thorough inspection on criteria which could not otherwise support a roving-patrol stop.[38] In this case a "point" agent would visually inspect all cars as they came to a "virtual, if not a complete, halt."[39] The officers often selected vehicles on less than articulable suspicion, sometimes merely because of the driver's apparent Mexican heritage.[40]

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[33] A vehicle stop and search constitutes a seizure under the Fourth and Fourteenth Amendments even if the purpose of the stop is limited and the resulting detention quite brief. United States v. Martinez-Fuerte, 428 U.S. 543, 556-58 (1976).

[34] *See* United States v. Montoya de Hernandez, 473 U.S. 531, 538-39 (1985) (noting sovereignty interests at border); United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) (noting that "[e]xcept at the border and its functional equivalents" vehicles may only be stopped upon reasonable articulable suspicion); Clancy, *supra* note 27, at 557 ("This power is grounded solely on national sovereignty; that is, the federal government has both the right and obligation to protect the nation's borders from legally excludable persons and things.").

[35] *Montoya de Hernandez*, 473 U.S. at 538; *see also* United States v. Ramsey, 431 U.S. 606, 616 (1977) (noting that border searches are "reasonable simply by virtue of the fact that they occur at the border"); United States v. Thompson, 475 F.2d 1359, 1362 (5th Cir. 1973) (finding that searches at border may be conducted upon mere suspicion of illegal activity whereas; searches, in interior of country must be based on reasonable suspicion).

[36] *Brignoni-Ponce*, 422 U.S. at 881 (disallowing roving border stops without showing of articulable suspicion of criminal behavior).

[37] 428 U.S. 543 (1976).

[38] *Martinez-Fuerte*, 428 U.S. at 563.

[39] *Id.* at 546.

In reaching its conclusion that such stops did not offend the Fourth Amendment, the Court wrote that while the Fourth Amendment is designed to "prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals" but that the public interest in preventing illegal aliens outweighed the interests of the individual.[41] The factors considered were the brief nature of the stop, impossibility of "particularized study of a given car," the "routine" and "quite limited" intrusion of the stops and a diminished expectation of privacy one has in an automobile.[42] The Court went on to write that it "think[s] it follows that the Border Patrol must have wide discretion in selecting the motorists to be diverted for the brief questioning involved."[43]

Several limitations apply to the *Martinez-Fuerte* case. Foremost, it is vital to note that in this case there was no search of the vehicle or its occupants beyond what could be seen from outside the vehicle, a point the Court made at least twice.[44] Additionally, the Court explicitly limited the holding to the type of stops at issue and held that any further detention must be grounded upon consent or probable cause.[45] Finally, one key aspect the Court considered in determining that the intrusion upon drivers was "minimal," was that all vehicles were stopped and because of the limited discretion given the operating agents, the risk for harassment was lessened.[46]

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[40] *Id.* at 563.

[41] *Id.* at 554, 557-58.

[42] *Id.* at 557-58.

[43] *Martinez-Fuerete*, 428 U.S. at 563-64.

[44] *Id.* at 558, 561 (writing "[n]either the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search" and "the same conclusion is appropriate here, where we deal neither with searches nor the sanctity of private dwellings").

[45] *Id.* at 567.

[46] *Id.* at 559-60. A similar requirement that all aviation passengers be screened is discussed *supra*.

2. Sobriety Checkpoints

In *Michigan Department of State Police v. Sitz*,[47] the Supreme Court upheld the use of highway sobriety checkpoints at which each and every vehicle was stopped for a brief period and in a manner constitutionally indistinguishable from the visual inspection at the border in *Martinez-Fuerte*.[48] In reaching this conclusion, the Court extensively examined the effectiveness requirement of the *Brown* test, concluding that a 1.6% effectiveness rate[49] was constitutional, especially since the checkpoint approved in *Martinez-Fuerte* had only a .12% effectiveness rate.[50]

In some very disturbing language, the Court also noted that there was "virtually no difference between the levels of intrusion on law-abiding motorists" in *Sitz* than those in *Martinez-Fuerte*.[51] The Court did not acknowledge that motorists crossing a national border might regard a brief visual inspection of the car's interior from outside the vehicle at permanent checkpoints as fundamentally different than a temporary checkpoint established in an urban environment, perhaps only blocks from home, for the purposes of discovering the use of alcohol. Regarding the intrusion as "minimal," in part because the brief stops would be identical "save for the nature of the questions the checkpoint officers might ask," the Court did not address either the special nature of the border or the compelling interest in preventing illegal immigration.[52]

3. Drug Interdiction Checkpoints

In the fairly recent case of *City of Indianapolis v.*

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[47] 496 U.S. 444 (1990).

[48] *Sitz*, 496 U.S. at 488, 453. The average delay for each vehicle was twenty-five (25) seconds. *Id.* at 448.

[49] The effectiveness rate is determined by dividing the number of cars stopped by the number of drivers arrested for driving under the influence. *Id.* at 455.

[50] *Id.* at 455.

[51] *Id.* at 451-52.

[52] *Id.*; *see* United States v. Martinez-Fuerte, 428 U.S. 543, 551-53 (1976).

Edmond,[53] the Supreme Court found that the City's vehicle checkpoints aimed at the interdiction of illegal drugs violated the Fourth Amendment because the "primary purpose was to detect evidence of ordinary criminal wrongdoing."[54] Although this case dealt with stops, which are seizures[55] and not searches, several important points may be drawn. First, the Court invalidated the program despite the limitations placed on the conducting officer's discretion and the manner in which they could stop and search.[56] Second, the Court emphasized the "particular context" of those cases involving searches and checkpoints on the border.[57] Finally, while acknowledging that cases allowing random stops were particularly related to special interest in roadway safety or immigration control, the Court wrote:

> *[T]he gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.* Rather, in determining whether individualized suspicion is required, we must consider the nature of the interest threatened and their connection to the particular law enforcement practices at issue.[58]

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[53] 531 U.S. 32 (2000).

[54] *Edmond*, 531 U.S. at 41.

[55] *Id.* at 40. Although the officers walked a drug detection dog around the exterior of the stopped cars, that fact did not transform the seizure into a search. *Id.*

[56] *Id.* at 35. At each checkpoint the officers stopped a predetermined number of vehicles, all of which were given the same treatment. *Id.* The officers followed an explicit protocol in approaching and questioning each driver and were not permitted to take any vehicle out of order. *Id.* Searches were not random but instead based upon either consent or particularized suspicion of the necessary quantum. *Id.* The total duration of each stop was not to exceed five (5) minutes. *Edmond*, 531 U.S. at 35.

[57] *Id.* at 38-39 (writing that "[o]ur subsequent cases have confirmed that considerations specifically related to the need to police the border were a significant factor in our *Martinez-Fuerte* decision.") The Court mentioned *Martinez-Fuerte*, *Ortiz*, *Brignoni-Ponce* and *Almeida-Sanchez*. *Id.* at 38.

[58] *Id.* at 42-43 (emphasis added). The Court went on to say that the Fourth Amendment "would almost certainly permit an appropriately tailored roadblock set up to thwart an IMMINENT terrorist attack." *Id.* at 44 (emphasis added). Later the Court cautioned that this opinion did nothing to affect the validity of airport searches where the need to ensure public safety "can be particularly acute." *Id.* at 47-48.

II. RANDOM VEHICLE SEARCHES & STOPS

A. Random Stops

Roving patrol stops, which are essentially random stops,[59] are fundamentally distinct from checkpoints at which all vehicles are subjected to the same treatment and scrutiny; therefore, the balancing factors are weighed differently.[60] In *Delaware v. Prouse*,[61] the Supreme Court overturned random, suspicionless stops of vehicles to check for a valid driver's license and vehicle registration as violative of the Fourth Amendment.[62] In reaching this conclusion, the Court, while acknowledging the state's "vital interest" in permitting only those qualified to operate vehicles on its roads, concluded that the stops inherently restricted freedom of movement, subjected the driver to a "possibly unsettling show of authority" and might "create substantial anxiety."[63] In analyzing whether the random spot checks met the minimum effectiveness requirement, the Court noted that finding an unlicensed driver by randomly choosing from the "entire universe of drivers . . . . does not appear sufficiently productive to qualify as a reasonable law enforcement practice."[64] Instead, it reasoned that the best and most productive method for enforcing traffic and safety regulations was upon some observed, particularized observation.[65]

The Court went on to opine that if the stops did not "involve the unconstrained exercise of discretion" and were set up such that "all vehicles are brought to a halt or to a near halt, and all are subjected to a show of the police power of the community" they might come within constitutional bounds.[66] This was because the Court reasoned that if drivers saw other vehicles being stopped and subjected to the officer's authority, they would be less likely to be frightened or annoyed.[67]

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[59] *Brignoni-Ponce*, 422 U.S. at 875.

[60] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976) ("But we view checkpoint stops in a different light because the subjective intrusion-the generating of concern or even fright on the part of lawful travelers-is appreciably less in the case of a checkpoint stop.")

[61] 440 U.S. 648 (1979).

[62] *Prouse*, 440 U.S. at 663.

[63] *Id.* at 659-60.

[64] *Id.*

[65] *Id.* at 659.

In an earlier case dealing with the international border,[68] the Court said that the intrusion of a vehicle stop in which the driver was merely questioned about his immigration status, but was not searched, was "modest."[69] In deciding the random stop was unreasonable despite the only modest intrusion, the Court wrote:

> [T]he nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators. Consequently, a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference.[70]

This reasoning seems at odds with the very nature of smuggling, the attempt to offer no clues regarding the true nature of a person's activity and the Court's own logic in allowing the checkpoints in *Martinez-Fuerte*.[71]

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[66] *Id.* at 657-65.

[67] *Prouse*, 440 U.S. at 657.

[68] United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

[69] *Brignoni-Ponce*, 422 U.S. at 880. There was no search of the vehicle or its occupants and the visual inspection was circumscribed to those areas visible by anyone standing beside the vehicle. *Id.* Roving patrol stops such as the one in this case usually take no more than one minute. *Id.*

[70] *Id.* at 883. The Court earlier noted that if it allowed the Border Patrol to randomly search vehicles within a "reasonable distance" of the border, "[B]order Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law." *Id.* at 883.

[71] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976) (writing that requiring reasonable suspicion would "largely eliminate any deterrent to the conduct of well-disguised smuggling operations, even though smugglers are known to use these highways regularly.")

B. Random Searches

The preceding cases in Part I and Part II-A each dealt with a brief stop of a vehicle, not a search, and thus are factually distinguishable from the situation presently being addressed. In numerous cases, the Supreme Court has held that the search of a vehicle stopped randomly violates the Fourth Amendment, even where such search takes place along the border.[72]

In *Almeida-Sanchez*, Justice Stewart for the Court held that since the stop was not predicated upon a search warrant, probable cause or even reasonable suspicion, no claim could even be made that the search "was constitutional under any previous decision of this Court involving the search of an automobile."[73] It was also said that the absence of a warrant requirement for vehicles does not create a "field day for the police in searching automobiles" and that there must still be probable cause for a search.[74]

In a case decided only two years later, the Court addressed the random search of vehicles at a traffic checkpoint, which it said differed from the roving patrol stops of *Almeida-Sanchez* in several important respects.[75] In what is perhaps the most factually similar case to the issue of this comment, officers of the Border Patrol established a traffic checkpoint over sixty (60) miles from the Mexican border on a principal highway.[76] This checkpoint was not on the border or its functional equivalent.[77] It was preceded by numerous warning signs and, despite having permanent facilities, was closed one-third (1/3) of the time because of bad weather and other factors such as heavy traffic and lack of personnel.[78] The manning officers screened all northbound traffic, stopping those vehicles that aroused suspicion of illegal immigration trafficking.[79] If the officer's suspicion was not dispelled or was increased because of the stop, he would "inspect portions of the car in which an alien might hide."[80] Ortiz was stopped without the officers having any "special reason" to suspect that he was transporting illegal aliens.[81] The government advanced two reasons why the random search was distinguishable from the invalidated roving patrol stops in *Almeida-Sanchez*. First, the government argued that a checkpoint necessarily limits an officer's discretion in who he may search for the simple reason that he could only stop and search vehicles passing through the checkpoint.[82] Second, that because the stops and searches were conducted in view of others and in light of the visible signs of the officer's authority, the fright or annoyance of the motorist was substantially less than in a roving patrol stop.[83] The Court rejected both assertions with the following apt and important language:

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[72] Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

[73] *Almeida-Sanchez*, 413 U.S. at 269. Although noting a vehicle may be stopped without a warrant, *see* Carroll v. United States, 267 U.S. 132 (1925), the Court affirmed that probable cause is the minimum requirement for a reasonable search. *Id.* at 269-70 (citing Chambers v. Maroney, 399 U.S. 42 (1970)).

[74] *Id.* at 269.

[75] United States v. Ortiz, 422 U.S. 891, 892 (1975). The Court, after noting that it rejected the Government's contention that the strong national interest in controlling immigration and the practical difficulties of policing the Mexican/American border justified dispensing with the warrant and probable cause requirements of the Fourth Amendment, said that the facts of *Almeida-Sanchez* did not require that it decide whether the same rule applied to traffic checkpoints. *Ortiz*, 422 U.S. at 892.

[76] *Ortiz*, 422 U.S. at 893.

> While the differences between a roving patrol and a checkpoint would be significant in determining the propriety of the stop, which is considerably less intrusive than a search, Terry v. Ohio, supra, they do not appear to make any difference in the search itself. The greater regularity attending the stop does not mitigate the invasion of privacy that a search entails. Nor do checkpoint procedures significantly reduce the likelihood of embarrassment. Motorists whose cars are searched, unlike those who are only questioned, may not be

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[77] *Id.* at 892.

[78] *Id.* at 893. Likewise, random vehicle searches are only performed when the terror alert has been elevated to orange. *See supra* note 2 and accompanying text.

[79] *Ortiz*, 422 U.S. at 893.

[80] *Id.* at 893-94.

[81] *Id.* at 892.

[82] *Id.* at 894.

[83] *Id.* at 894-95.

> reassured by seeing that the Border Patrol searches other cars as well. *Where only a few are singled out for a search, as at San Clemente, motorists may find the searches especially offensive.*
>
> Moreover we are not persuaded that the checkpoint limits to any meaningful extent the officer's discretion to select cars for search . . . . It is apparent from these figures that checkpoint officers exercise a substantial degree of discretion in deciding which cars to search. The Government maintains that they voluntarily exercise that discretion with restraint and search only vehicles that arouse their suspicion, and it insists the officers should be free of judicial oversight of any kind. *Viewed realistically, this position would authorize the Border Patrol to search vehicles at random, for no officer ever would have to justify his decision to search a particular car.*
>
> *This degree of discretion to search private automobiles is not consistent with the Fourth Amendment. A search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search.* We are not persuaded that the differences between roving patrols and traffic checkpoints justify dispensing in this case with the safeguards we required in Almeida-Sanchez. *We therefore follow that decision and hold that at traffic checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause.*[84]

Justice Rehnquist, who dissented in *Almeida-Sanchez*, concurred in *Ortiz*, stressing that the *Ortiz* opinion was confined to full searches which are not nearly as intrusive as fixed checkpoints.[85]

III. THE BALANCING TEST—WHERE THE RUBBER MEETS THE ROAD

The permissibility of a particular law enforcement practice is determined by weighing the intrusion on an individual's

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[84] *Ortiz*, 422 U.S. at 895-97 (internal citations omitted) (emphasis added).

[85] *Id.* at 898-99 (Rehnquist, C.J., concurring).

Fourth Amendment interests against the practice's promotion of legitimate governmental interests.[86] When the harm that the government seeks to avoid is substantial, there exists "ample justification" for reasonable searches.[87] However, "[i]n those situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"[88] In determining the constitutionality of random, suspicionless vehicle searches outside airports, we must undertake an analysis of the *Brown*[89] factors previously mentioned.

A. *Gravity of Public Concern*

The Supreme Court has noted "that where the risk to public safety is substantial and real, blanket suspicionless searches may rank as 'reasonable'—for example, searches now routine at airports and at entrances to courts and other official buildings."[90] As the events of September 11, 2001, tragically and dramatically emphasized, America's aviation industry is far from immune from attack and in some circumstances may even be an extremely inviting target. Just as any other large congregation of persons, such as the sporting and social events that saw no-fly zones in the weeks after 9/11, airport terminals are a possible target for terrorism.

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[86] *Prouse*, 440 U.S. at 654 (citing United States v. Ramsey, 431 U.S. 606, 616-19 (1977) and United States v. Martinez Fuerte, 428 U.S. 543, 555 (1976)).

[87] Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 674-75 & 675 n.3 (1989) (writing "[w]hen the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage . . . and the passenger is given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.")

[88] *Prouse*, 440 U.S. at 654-55 (citations omitted).

[89] Brown v. Texas, 443 U.S. 47 (1979); *see supra* note 32 and accompanying text.

[90] Chandler v. Miller, 520 U.S. 305, 323 (1997); *see also* City of Indianapolis v. Edmond, 531 U.S. 32, 47-48 (2000) (noting need for public safety in airports is "particularly acute"). For support of this flexible standard, the Court looked to *Nat'l Treasury Employees Union v. Von Raab*, which dealt with random suspicionless drug testing of United States Customs Service employees who routinely dealt with interdiction of illegal drugs, the carrying of firearms or the handling of classified material. *Von Raab*, 489 U.S. at 662. The Court sustained the testing of employees whose positions involved the interdiction of illegal drugs and the carrying of firearms, but stated the record was insufficient to support a conclusion on whether the policy included those who might not actually handle classified material. *Id.* at 679. The Court, in holding that such tests were reasonable, emphasized the need to discover any disabilities which might "endanger the integ-

The need to provide safety for the aviation industry is both obvious and of paramount concern to all Americans. However, as the Court wrote in *Edmond*, the gravity of the threat alone is not dispositive of what measures law enforcement may take in seeking advance protection of terminals.[91] One must remember that unlike the checkpoint stop in *Martinez-Fuerte*, law enforcement has many avenues available in detecting explosives and minimizing the danger they present.[92] Therefore, while the threat posed by vehicles that may contain explosives is high, that alone cannot serve as a justification for random searches apart from some other showing that the searches are "strictly tied to and justified by the circumstances" which give rise to them.[93] It would also be remiss to think that airports are the only targets or that this type of interest is not present in other contexts.[94]

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rity of our Nation's borders or the life of the citizenry" and the diminished expectation of privacy "by virtue of the special, and obvious, physical and ethical demands of those positions." *Id.* Further, the Court was faithful to a long line of cases which held that the "special needs" must be "beyond normal law enforcement." *Id.*; *see also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995).

[91] *See supra* note 58 and accompanying text.

[92] For example, law enforcement may utilize machines or canines capable of detecting explosives in minuscule amounts, conduct visual inspections of vehicles parked in areas where an explosives-laden vehicle could conceivably pose a danger to the terminal, redesign parking and service areas such that any explosion would be contained or search all vehicles entering designated areas. Some airports have dispensed with random vehicle searches after blast studies showed that a car bomb posed no danger to terminal areas. *See* Calnan, *supra* note 6.

[93] Terry v. Ohio, 392 U.S. 1, 19 (1968).

[94] *See Truck Driver Pleads Guilty to Helping al-Qaida Plot*, CLARION-LEDGER (Jackson, Miss.), June 20, 2003 at 3A (reporting that terrorist who had met Osama bin Laden "admitted plots against trains and the Brooklyn Bridge").

B. Degree of Advancement of the Public Concern

While the Court has set an extremely low threshold for the minimum effectiveness of a checkpoint seizure,[95] the requirement remains. In *Prouse*, the Court opined that finding an unlicensed driver by randomly stopping cars was not "sufficiently productive to qualify as a reasonable law enforcement practice."[96] Unlike many of the cases dealt with in this comment, we have no data with which to compare the effectiveness of random vehicle inspections, for the simple reason that law enforcement officials refuse to provide it.[97] Because we have no reason to think otherwise, it should be assumed that the random vehicle searches have been completely unsuccessful in detecting an imminent terrorist attack.[98] Therefore, until such time as evidence to the contrary is produced, courts should assume the searches have a 0% effectiveness ratio.

C. Intrusion Upon Individual Liberty

While some courts have gone so far as to conclude that searches of the person in an airport environment are so minimally intrusive that they carry "no stigma" and are merely the product of "self-selection,"[99] that reasoning seems less persuasive in the context of random searches of automobiles. First, "it is generally assumed . . . that nothing short of screening all passengers will suffice."[100] Courts have justifiably found random searches of individuals absent particularized suspicion much more troubling than standardized, administrative entry searches.[101] Also, although in other contexts automobiles enjoy a lesser protection from search than that attributed to the person and effects,[102] in this situation they might very well give the driver a greater expectation of privacy and thus cause the intrusion of a search to be much greater.[103]

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[95] *See supra* notes 47, 48 and 63 and accompanying text.

[96] *See supra* notes 9 and 64 and accompanying text.

[97] *See supra* note 9 and accompanying text.

[98] This is not to say that the searches have been unsuccessful in deterring an attack—an extremely difficult thing to prove for sure—but rather that the absence of a single reported incident where explosives were found shows that they have not accomplished their aim of deterring an attack before it happens. The government should not benefit from its refusal to disclose information to afflicted flyers. *See, e.g.*, Brown v. Latch, 416 S.W.2d 859, 861 (Tex. Civ. App. 1967) ("Where a party does not in any way seek to contradict the testimony of his adversary on a particular point, the presumption is that he has no testimony to controvert it; and when the proof tends to establish a fact, and at the same time discloses that it is within the power and the interest of the opposite party to disprove it, the silence of the opposing party not only strengthens the probative force of the affirmative proof but of itself is clothed with a certain probative force.")

[99] LaFave, *supra* note 21 at § 10.7(a).

As recognized in *Ortiz*, the regularity attending the inspections does not mitigate the invasion of privacy that the search entails, nor does the sight of other cars lessen the embarrassment that selected drivers experience.[104] In fact, being singled out for search might very well increase the intrusion, fright and embarrassment upon a driver who is separated from other vehicles and forced to open their private auto without any articulated reason to suspect them of wrongdoing. Also, just because searches of persons, and now automobiles, are commonplace, that does not obviate the reasonable expectation of privacy a person has in the airport context.[105]

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[100] *See supra* note 23.

[101] *See* United States v. Davis, 482 F.2d 893, 908-10 (9th Cir. 1973); United States v. Meulener, 351 F. Supp. 1284, 1291 (C.D. Cal. 1972).

[102] United States v. Martinez-Fuerte, 473 U.S. 543, 561 (1976); *see also* Chris K. Visser, *Without A Warrant, Probable Cause, Or Reasonable Suspicion: Is There Any Meaning To The Fourth Amendment While Driving A Car*? 35 HOUS. L. REV. 1683, 1686-98 (1999) (listing several avenues by which police may search car or its occupants, many of which are not applicable to persons on street).

[103] While flyers have abundant notice that their person could be subjected to a thorough search, including the removal of their shoes, it seems clear that fewer drivers are cognizant to the fact that they are opening the contents of their entire vehicle to inspection merely because they entered a loading or parking area designated for random search. *C.f.* Delaware v. Prouse, 440 U.S. 648, 662 (1979) (writing that "[a]utomobile travel is a basic, pervasive, and often necessary mode of transportation" and that "[u]ndoubtably, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel.")

[104] United States v. Ortiz, 422 U.S. 891, 895-97 (1975).

[105] People v. Hyde, 524 P.2d 830, 833 n.4 (Cal. 1974) ("Although it could be argued that the widespread measures employed to combat hijackings have resulted in the elimination of all expectations of privacy at airports, such a concept would sanction an erosion of the Fourth Amendment by the simple and expedient device of its universal violation.")

The self-selection argument is also more dubious than in the pre-boarding context. While it is well known that all flyers will, of necessity, be searched for weapons before boarding an airplane, it is not widely realized that random vehicles might also be searched.[106] Also, were it possible for airplanes to effectively insulate themselves from the danger of an armed person, as terminals may be shielded from explosions, courts might be forced to rethink the gravity of the governmental interest. Moreover, many travelers will have no choice but to submit to the possibility of search because they are physically unable to make the often long trek from the unsearched parking and garage areas to the terminal and thus must take a vehicle to the terminal area.[107]

The time that these searches take is more intrusive than the checkpoint programs in *Martinez-Fuerte*, *Sitz*, *Prouse* and *Brignoni-Ponce*. The random vehicle searches at issue take far longer, in some cases nineteen times longer, than the twenty-five seconds in *Sitz* and one minute in *Brignoni-Ponce*.[108] The searches take so much time that travelers are advised to arrive earlier when they are in effect.[109]

Perhaps most troubling is the wide discretion given to officers to choose who is searched. Given that the searches are random and not based upon any particularized factors, authorities have carte blanche to choose individuals based upon their race, sex, religion or other impermissible factors. As discussed earlier, law enforcement authorities refuse to disclose how and why they choose certain cars and drivers.[110] Thus, we have a situation identical to that in *Ortiz*, where the Court found such a degree of discretion inconsistent with the Fourth Amendment despite calls for it to trust law enforcement to exercise discretion and restraint and "search only vehicles that arouse their suspicion."[111]

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[106] This factor is slightly dispelled by the signs placed on access roads notifying drivers that they might be requested to allow for an inspection of their vehicle.

[107] Possible reasons for this inability are physical handicap, inclimate weather, small children and heavy luggage.

[108] *See supra* notes 48 and 69 and accompanying text. The random vehicle searches can take up to eight minutes. Hoover, *supra* note 8.

[109] *See* Sumana Chatterjee, *National Terror Alert Level Set to Yellow—Midpoint on Scale*, PITTSBURG POST-GAZETTE, at A9, available at 2003 WL 3905832 (writing that "[the] flying public may have a little more time to get to their flights because random vehicle searches at airports, . . . will be reduced").

[110] *See supra* note 9 and accompanying text.

It is of vital importance to remember that only searches are being dealt with and not the seizures involved in a checkpoint stop. In *Martinez-Fuerte*, the Court noted that checkpoint stops are viewed in a different light than roving patrol stops because of the reduced potential for subjective intrusion.[112] The Court went on to point out that roving patrol stops were intolerable in part because they would subject motorists to "potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers."[113] In *Almeida-Sanchez*, the Court noted that while the *Carroll* doctrine dispenses with the warrant requirement for automobiles, a search must still be conducted upon probable cause.[114] Nothing before us today changes that requirement.[115]

CONCLUSION

Random vehicle searches violate the reasonableness requirement as construed by the Supreme Court. They fail under each prong of the *Brown* test. While no one will doubt the seriousness of the public concern in preventing another aviation-related disaster, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose."[116] Not only are specific individuals chosen to be searched, thereby increasing the subjective intrusion upon the unfortunate traveler, the searches pose a far greater objective intrusion than any approved seizure. The conducting officials appear to have unlimited discretion and rely on the court to "just trust [them]" to appropriately limit their actions. The Court rejected this position in *Ortiz* and should do so here.

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[111] United States v. Ortiz, 422 U.S. 891, 896 (1975).

[112] United States v. Martinez-Fuerte, 473 U.S. 543, 558 (1976).

[113] *Id.* at 558-59 (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 882-83 (1975)).

[114] Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973).

[115] *See supra* Part III-B.

[116] *See supra* note 58.

The randomness of these searches likewise calls their level of intrusion into question. As the Supreme Court noted in the context of searches for illegal immigrants, "a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference."[117] In the context of a search, which is a more intrusive measure than a stop, this language becomes even more compelling.

As was clearly shown on 9/11, terrorists are paying attention to the vulnerabilities in America's security system.[118] They exploit weakness and opportunity whenever possible.[119] They use our established patterns and procedures against us. This makes the implementation of random searches only at times of "Orange Alert" even more preposterous and offensive. If officials feel that searches of vehicles in these areas are necessary, why do they not execute them upon all drivers at all times and thereby alleviate some intrusion and increase the likelihood of detection? Or why do they announce the presence of the alerts in a half-hearted effort to fulfill the constitutional requirements for an administrative search? Furthermore, while the media has repeatedly reported on continuing threats to airlines, none of those reports have identified terminals and parking garages, the only areas protected by random searches.[120]

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[117] *See supra* note 70 and accompanying text.

[118] *See Aviation Security Focus of Panel Studying 9-11*, CLARION-LEDGER (Jackson, Miss.), May 23, 2003, at 8A ("The hijackers behind the Sept. 11, 2001 terror attacks understood and exploited the nation's strategy for keeping planes safe . . . . The lesson . . . is that the government must continuously implement new and unannounced aviation security procedures.")

[119] For example, the federal government "suspended two programs that allowed foreigners to stay in U.S. airports without visas while awaiting flights to other countries" amid "specific, credible intelligence" that terrorist groups, including al-Qaida, had "identified the visa and passport exemptions as a means to gain access to aircraft en route to and from the United States.'" *Terror Threat Clamps Lid On Visa Exemptions*, CLARION-LEDGER (Jackson, Miss.), Aug. 3, 2003, at 6A.

[120] *See Bombing Suspect's Terror Info Questioned*, CLARION-LEDGER (Jackson, Miss.), Aug. 1, 2003, at 7A (reporting detainee's warning of new plots to hijack

Flyers, out of necessity, surrender a portion of their privacy. There is simply no other sound way to deal with the threat of guns, knives and explosives within an enclosed fuselage other than detection. The same reasoning, however, does not apply to airport terminals and parking garages. As we know, terminals and parking garages can be designed so that they are insulated from the danger of a vehicle-delivered bomb. Nothing suggests that any measures have been taken to prevent a fanatical terrorist from simply driving up to the inspection point and detonating his deadly cargo. Moreover, an opportunistic terrorist may make note of what types of drivers and vehicles are stopped and merely alter his delivery plans accordingly. Random searches simply do not rise to the required level of effectiveness, as the Supreme Court has often noted.

For these reasons, courts addressing the constitutionality of random vehicle searches conducted at or adjacent to airports should find that such searches violate the Fourth Amendment and proscribe their use.

M. Reed Martz

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planes and use them as weapons caused Homeland Security Department to send a new warning to airlines and law enforcement); *Lawmakers Denounce TSA Request*, CLARION-LEDGER (Jackson, Miss.), Aug. 2, 2003, at 3A (detailing lawmakers' criticism of TSA announcement TSA plans to trim 20% from air marshal program funding and payment of only two 2% of money pledged for automated baggage bomb screening).

A Pragmatic Approach to EEOC Misconduct: Drawing a Line on Commission Bad Faith in Title VII Litigation

Within the folds separating governmental powers, the judiciary has long given administrative agencies latitude to complete their respective functions.[1] Is it accurate to construe this autonomy as immunizing the conduct of the Equal Employment Opportunity Commission ("EEOC" or "Commission") by allowing the agency to ignore their federal statutory requirements when prosecuting suits under Title VII of the Civil Rights Act of 1964?[2] This double standard has been promoted under a guise of procedural limitations and administrative discretion;[3] however, deference should end where misconduct begins. EEOC violations during pre-litigation activities call for heightened judicial awareness and stronger responses to Commission misconduct because such misconduct unduly burdens employers and ultimately costs consumers.

The Commission's administrative tasks are critical to the ethical reduction of workplace discrimination under Title VII in part because they must be completed before either the EEOC or an individual can commence a lawsuit. Moreover, when the EEOC completes the administrative requirements without integrity, it is knowingly disregarding the letter and spirit in which its regulations were promulgated, which should limit the Commission's ability to hale employers into court. The EEOC is instrumental in effectuating Title VII's goal of fostering equal employment. This goal is disserved when the Commission does not appropriately complete these requirements, and problems of fairness and due process can arise for employers and the courts alike.

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[1] Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 80-83 (2002) (discussing discretion generally given to the EEOC); *see, e.g.,* Hilton v. Wynam-Gordon Co., 624 F.2d 379, 383 (1st Cir. 1980) (citing *Blizard v. Fielding*, 572 F.2d 13, 16 (1st Cir. 1978) for the proposition "that an EEOC investigatory finding is entitled to 'great deference' from the trial court").

[2] *See* Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629, 629 (1974) ("Although the public is not free to violate federal administrative regulations, agencies in some circumstances have been permitted to depart from their own regulations.").

[3] *Id.* at 629-30.

The following commentary consists of four main sections. As an introduction, the first section surveys the basic EEOC procedures. Next, the unique burdens required in challenging EEOC actions are described, and judicial responses to bad faith during the investigation and conciliation steps are analyzed. The third section chronicles the primary defensive devices utilized by attorneys and examines the likelihood of success for each. Finally, the fourth section explains several policy arguments which may be persuasively used by a practitioner faced with EEOC misconduct.

I. INTRODUCTION TO THE EEOC'S ROLE IN TITLE VII CLAIMS

When an employer[4] engages in an unlawful employment practice the provisions of Title VII provide the most common basis for legal redress.[5] Initially, Title VII limited the Equal Employment Opportunity Commission's[6] power of investigating claims and engaging in out-of-court dispute resolution; however, in 1972, the legislation was amended to allow the EEOC to commence actions on behalf of individuals.[7] A private individual or the EEOC can commence a Title VII lawsuit, but in either case, the Commission will have some degree of involvement.[8] With the expansion of the EEOC's role,[9] the administrative obligations required to establish a viable Title VII case have increased and, consequently, so have the opportunities for abusing its enlarged powers.[10] It is paramount to understand that Title VII does not create a cause of action merely because some type of discriminatory act by an employer has occurred.[11] A cause of action is allowed only when certain administrative steps are successfully completed by the EEOC. The process is begun when an individual or Commissioner files a charge,[12] which is "simply a jurisdictional springboard enabling the EEOC to begin its investigation of the alleged discrimination."[13]

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[4] *See generally* "Title VII applies to employers, employment agencies, apprenticeship programs and labor organizations whose activities affect interstate commerce." HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE § 2.3 (2001). Although several exceptions to the rule exist, the most often encountered is the exception that Title VII does not apply to an employer with fourteen or fewer employees. *Id.*

[5] Pub. L. No. 90-202, 81 Stat. 602 (Title VII is § 706 of the Civil Rights Act of 1964 found at 42 U.S.C. § 2000e-5). This remedial legislation has had a profound impact on civil litigation and the landscape of employment in America today. Kathryn Lynch, *The EEOC: Comments on the Agency and Its Role In Employment Discrimination Law,* 20 GA. J. INT'L & COMP. L. 89, 89-90 (1990). In general, the Equal Employment Opportunity Commission was created to enforce Title VII through regulative and litigious processes established by five directors appointed by the President. 42 U.S.C. § 2003-4(a) (2000).

[6] The Equal Employment Opportunity Commission is the federal entity created to enforce Title VII, and the advent of the agency has "significantly altered the nature of employment in the United States." Lynch, *supra* note 4 at 89-90. The EEOC officially began operation on July 2, 1965 and currently enforces Title VII, the Age Discrimination Employment Act of 1967, the Equal Pay Act of 1963, Title I and Title V of the Americans with Disabilities Act, Sections 501 and 505 of the Rehabilitation Act of 1973 and the Civil Rights Act of 1991. U.S. Equal Employment Opportunity Commission: An Overview, EEOC Overview (2003), *available at* http://www.eeoc.gov/statauth.html. The infrastructure of the Commission consists of 51 field offices and 24 district offices in metropolitan areas across the nation. U.S. Equal Employment Opportunity Commission: Contact EEOC (2003), *available at* http://www.eeoc.gov/offices.html.

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[7] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3(f)(1), § 8 (e)(1), 86 Stat. 103, 105-06, 110 (changing the EEOC's role in litigating Title VII claims and codified as amended in sections of 42 U.S.C.). Senator Dominick stated the rationale behind enlarging the EEOC's powers was to better serve the "overriding interest in equal employment," and to "take over at the level where conciliations fail." 118 CONG. REC. S. 170 (Jan. 20, 1972). There are two major views on EEOC power stemming from the statutory amendment. *See* Lynch, *supra* note 4, at 92. One view believes that the power to investigate has been administered too broadly and has "spawned" unnecessary litigation; others believe that the Commission is hindered by the complexity of the regulations with which they are required to comply. *Id.*

[8] 42 U.S.C. § 2000e-5(b) (1994) (stating in pertinent part that "[w]henever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge, . . . make an investigation thereof . . . [and if reasonable cause exists] the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion").

[9] To gain a perspective on the scope of EEOC involvement, in 2002, the EEOC filed 345 suits, 38% of the national federal lawsuits, and obtained $52.8 million in relief for victims of discrimination. U.S. Equal Employment Opportunity Commission, EEOC Overview (2003), *available at* http://www.eeoc.gov/stats/litigation.html.

[10] 42 U.S.C. §2000e-5(b).

[11] EEOC v. Equicredit Corp. of Am., 2002 WL 31371968, at *2 (E.D. Pa. 2002).

[12] The individual employee need only timely file a charge with the EEOC. LEWIS & NORMAN, *supra* note 3, at § 4.1. If the Commission does not pursue a judicial resolution on its own behalf, and issues a "notice of right to sue," an

A. The Basic Process

The EEOC's obligations under Title VII are generally divided into five interrelated administrative requirements: (1) charge, (2) notice, (3) investigation, (4) reasonable cause determination and (5) conciliation.[14] The first step an allegedly aggrieved employee will take is to file a *charge* of discrimination with the Commission.[15] The charge can be filed by either the employee or a Commissioner of the EEOC.[16] Within ten days of filing the charge, the Commission must provide *notice* to the employer of the allegations.[17] Next, the EEOC will *investigate* relevant evidence and will likely conduct a fact-finding conference to discuss the issues it is investigating.[18] Following

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individual is given the additional requirement to timely file a court action. *Id.*

[13] *Equicredit Corp.*, 2002 WL 31371968, at *5 (assessing an employer-defendant's motion for summary judgment for failure to exhaust administrative remedies).

[14] EEOC v. Container Corp. of Am., 352 F. Supp. 262, 265 (M.D. Fla. 1972) (synthesizing the requirements established in Section 2000-e-5).

[15] 29 C.F.R. § 1601.12(b) (2003). The charge only has to "identify the parties and describe generally the action or practice complained of." *Id.* Challenging the adequacy of a charge is not usually a particularly lucrative area for defense litigators since courts generally give the complainant the benefit of the doubt. *See* Downes v. Volkswagen of Am., Inc., 41 F.3d 1132 (7th Cir. 1982) (holding that charge was sufficient based on intake questionnaire completed by EEOC). *But see* Whitmore v. O'Connor Mgmt., Inc., 156 F.3d 796, 799 (8th Cir. 1998) (finding intake questionnaire was not intended as formal charge). On the other hand, a practitioner should not ignore the timeliness of the charge as this aspect has been frequently argued. *See* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002) (addressing 180-day and 300-day requirements in "deferral" states in addition to the applicability of the "continuing violation" doctrine). The intricacy of the limitations period for filing a charge is beyond the scope of this commentary.

[16] 42 U.S.C. §§ 2000e-5 (a), (b); 29 C.F.R. § 1601.14(a) (2003). One situation where a commissioner would file a charge is if "an aggrieved party has reason to fear reprisal if he or she files a charge." 3 Lex K. Larson, Labor and Employment Law, §30.02(4) (2003).

[17] 29 C.F.R. § 1601.12(a)(3). Valid notice to the employer is comprised of (1) the date when the alleged unlawful employment practice occurred, (2) the place where the alleged unlawful employment practice occurred and (3) the circumstances of the alleged unlawful employment practice. *Id.* Failure to provide notice does not usually bar a subsequent suit unless it substantially burdens the employer. 3 Larson, Employment *supra* note 16, at §32.01.

[18] 42 U.S.C. § 2000e-8. An investigation typically consists of subpoenas, on-site

the investigation, the EEOC will make a *determination* that either: (1) "reasonable cause" exists and proceed to the next administrative step, *conciliation*,[19] or (2) "no reasonable cause" exists and must dismiss the proceedings.[20] Regardless, the employee is entitled to a "right to sue" letter authorizing a private action to be instituted against the employer within 90 days of receiving the letter.[21] Of the five steps, investigation (step 3) and conciliation (step 5) probably require the most discretion by EEOC officers and, not coincidentally, are often

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inspections and personal interviews. Lynch, *supra* note 4, at 95. To accommodate the typical investigation, an employer should expect to make a position statement, provide documents and decide whether to permit an on-site investigation. U.S. Equal Employment Opportunity Commission, When a Charge Is Filed Against My Company (2003), *available at* http://www.eeoc.gov/small/chargesfiled.html (last modified December 17, 2001). If the employer believes the charges are frivolous or groundless, he or she should notify the Commission investigator during this stage so they can decide whether to dismiss the charge. *Id.* The investigation process is intended to be completed within 120 days of filing the charge; however, in practice, investigations are rarely completed within 120 days. 3 LARSON, EMPLOYMENT, *supra* note 15, at §32.02(5). One reason for the delays is that the agency is overburdened, for example, the average caseload in the Chicago EEOC office is forty cases per investigator. *New EEOC Investigative Process and Policies*, Client Alert (Wessels & Pautsch, May 2002 Chicago, IL), at 1. The Commision's "aspirational" interpretation of the statute ensures that an employer will be involved in a charge for a considerable amount of time.

[19] LEX K. LARSON, EMPLOYMENT DISCRIMINATION, § 75.01 (2d ed. 1994). The purpose of requiring the EEOC to perform an investigation is to determine whether reasonable cause existed to initiate a discrimination suit. EEOC v. K-Mart Corp., 694 F.2d 1055, 1066 (6th Cir. 1982). From a practical standpoint, the informal methods referred to come into play when the EEOC determines that reasonable cause does exist. See SUSAN M. OMILIAN & JEAN P. KAMP, 3 SEX-BASED EMPLOYMENT DISCRIMINATION § 12.02 (2003) (citing 42 U.S.C. §2000e-5(b), (f) (1997)). When these informal methods are not successful, then the EEOC has the power to initiate a lawsuit within 180 days. *Id.* If the Commission fails to bring suit for some reason, the allegedly aggrieved party can request a right to sue letter. *Id.*

[20] LEWIS & NORMAN, *supra* note 3, at § 4.5. "On April 19, 1995, the EEOC Chair announced that the Commission would dispense with substantive 'no cause' findings and instead, where reasonable cause has not been established, the Commission would begin dismissing cases without particularized findings." 3 LARSON, EMPLOYMENT *supra* note 15, at §32.05(1) n.2 (citing U.S. EEOC, *"Special Meeting of the EEOC to Consider Recommendations of the Charge Processing Task Force,"* directive No. 6, April 19, 1995)).

[21] Lynch, *supra* note 4, at 95; *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (holding *inter alia* that even if EEOC does not find cause, charging party can file private action after receiving authorization from Commission).

the most vulnerable for an employer to challenge.[22]

II. THE NUANCES OF CHALLENGING EEOC ACTIONS

A. *Initial Distinction for Investigations*

Courts have uniformly recognized an important distinction between a defendant's challenge of the sufficiency of an EEOC investigation and a challenge of the good faith manner in which an investigation is conducted.[23] Courts consistently reject the former.[24] By not allowing a defendant to question the sufficiency of investigations, judges have attempted to allow the Commission to control the statutory tasks since it is an expert in the field of discrimination investigation.[25] Another rationale for courts' hesitation to examine the investigative process before trial is that during the adjudication on the merits phase, a court will have a full opportunity to review the adequacy of the EEOC's position.[26] Allowing this practice would essentially require a "pre-trial trial" to determine whether the EEOC conducted a sufficient investigation.[27]

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[22] As mentioned above, the statutory requirements as synthesized by the *Container Corp.* court are: (1) charge, (2) notice, (3) investigation, (4) reasonable cause determination, and (5) conciliation. Although each of the five requirements is significant to defending an EEOC suit, this commentary will focus on investigation and conciliation as these two steps are probably more conducive to abuse. EEOC v. Container Corp. of Am., 352 F. Supp. 262, 265 (M.D. Fla. 1972).

[23] EEOC v. Keco Indus., Inc., 748 F.2d 1097, 1100 (6th Cir. 1984). *Keco* involved a charge of sex discrimination in which the EEOC found reasonable cause. *Id.* at 1098. The district court granted Keco summary judgment on the grounds that the EEOC did not have grounds to find cause. *Id.* at 1099. The Sixth Circuit Court of Appeals held that the district court erred in evaluating the sufficiency of the investigation. *Id.* at 1100. The decision was largely grounded in the public policy concern that this "line of inquiry would deflect the efforts of both the court and the parties from the main purpose of this litigation: to determine whether [the defendant] has actually violated Title VII." *Id.* (quoting EEOC v. Chicago Miniature Lamp Works, 526 F. Supp. 974 (N.D. Ill. 1981)). Finally, the court noted that since the investigation was not an adjudication of any type, is was not justifiable to allow the inquiry to further burden the court. *Id.*

[24] Allen v. Hearst Corp., 56 Fair Empl. Prac. Cas. (BNA) 1121, 1123 (D. Md. 1991) (holding that "the adequacy of the EEOC's investigation is not a relevant issue for trial"). Additionally, the Seventh Circuit characterized the inquiry into the grounds of the charge as outside the parameters of judicial review. United States v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local No. 1, 438 F.2d 679, 681 (7th Cir. 1971). Concededly, public policy favors a rule where pretrial processes are not unduly bogged down. On the other hand, allowing a respondent to attack the underlying reason he or she is even in court seems to be among the most legitimate kinds of challenges.

[25] *See, e.g.,* 42 U.S.C. § 2000e-8 (2000) (establishing wide discretion for Commission investigation into alleged Title VII infractions); *Keco Indus., Inc.*, 748 F.2d at 1100. As most administrative agencies enjoy a degree of discretion, so too does the EEOC. *See, e.g.,* EEOC v. Standard Forge & Axle Co., Inc., 496 F.2d 1392, 1394 (5th Cir. 1974) (abstaining from reviewing several matters "which are solely

The judiciary's respect for EEOC investigative findings is due in part to the Commission's experience investigating Title VII claims.[28] Consequently, the only occasion for reviewing a facially valid claim is when the defendant can present "mean-

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within the administrative discretion of the EEOC"). The discretion has been uniformly applied to avoid subjecting the Commission to "judicial second guessing." EEOC v. Dial Corp., 156 F. Supp. 2d 926, 940 (N.D. Ill. 2001). The concept of limiting judicial review into governmental processes is not a new or novel concept. In the *Morgan* decisions, the Supreme Court addressed the issue when the Secretary of Agriculture set the maximum rates for market agencies at certain stockyards. U.S. v. Morgan, 313 U.S. 409, 413 (1941). The Secretary of Agriculture acted contrary to a memorandum prepared by one member of his staff, and a private company claimed that the federal courts had the authority to evaluate his decision. *Morgan*, 313 U.S. at 422. The Court expressly stated that the Secretary's actions could not be challenged because "it was not the function of the court to probe the mental processes of the Secretary." *Id.* (citing one of the Court's earlier opinions in this same litigation, 304 U.S. 1, 18). Despite the *Morgan* decisions and because of the unique abilities of the EEOC to personally pursue employers, there should be instances where judicial review is allowed. While the premise of *Morgan* is based on sound public policy, fairness requires exceptional treatment in light of the Commission's increasing role in employment litigation and the gravity of the damages pursued.

[26] MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION: LAW AND LITIGATION § 11:27 (Dec. 2002 update) (stating succinctly that "[f]ailure of the EEOC to investigate a case adequately ... provides a weak argument, at best, for an employee seeking to bar a subsequent EEOC suit").

[27] LARSON, *supra* note 18, at §75.01(3). A "pre-trial trial" is inefficient because the employer-defendant will be given a "de novo" trial on the merits in court. *Id.* (citing *Keco*, 748 F.2d at 1100).

[28] *See generally* Leslie Abbot, Comment, *Out of Balance: Excluding EEOC Determinations Under Federal Rule of Evidence 403*, 14 LOY. L.A. L. REV. 707, 738 n.263 (1991). Although the Commission has become more efficient in handling claims, many employers believe that the quality of EEOC investigations has diminished. Kevin Troutman, *Trends Suggest Leaner (and "Meaner"?) EEOC: What It Means For You*, LABOR LETTER (Fisher & Phillips, Atlanta, GA, June 2002, at 1. The reasoning follows that a poor investigation is less likely to reveal the shortcomings in the plaintiff's charge. *Id.* There may be correlation between superficial investigations and the increase in docketed cases, especially when the number of charges has remained relatively stagnant. *Id.*

ingful evidence or raise a substantial question that judicial enforcement . . . would constitute an abuse of the court's process."[29] This abuse may be established through evidence that the EEOC acted in bad faith or used the investigation for an improper purpose.[30] Defendants' attempts to show abuse with respect to the sufficiency or adequacy of an investigation have been met with limited success. However, because investigators' findings do not always reflect their expertise,[31] it is still legitimate to refute the reasonableness of an investigation and prove bad faith.[32]

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[29] EEOC v. Dillard Dep't Stores, Inc., 1998 WL 25548, at *5 (N.D. Tex. 1998). The *Dillard* case arose in a subpoena enforcement proceeding, which happens before a discrimination suit is filed. The defendant, Dillard Stores, argued that an administrative subpoena should not have been enforced because the EEOC had no basis to support its charge. *Dillard Dep't Stores, Inc.*, 1998 WL 25548, at *1. In addressing the subpoena question, the court stated that an inquiry into the merits of the claim is irrelevant to establishing a facially valid claim. *Id.* at *5. On the other hand, the opinion does describe one exception to this general proposition, which applies when there is plain evidence of EEOC bad faith raised by the employer-defendant. *Id.* While subpoena determinations differ from discrimination suits, it is equally important to protect a client/employer from improper investigation since the Commission is essentially in the process of building a case against the employer.

[30] During the investigative stage, if an employer challenges enforcement of an EEOC subpoena, the test most courts will use is "whether [there is] a substantial question that this court's process will be abused if the subpoena is enforced." EEOC v. Am. Express Centurion Bank, 758 F. Supp. 217, 225 (D. Del. 1991). This test is viewed in light of the "totality of the circumstances." *Am. Express Centurion Bank*, 758 F. Supp. at 225.

[31] *See* Hilton v. Wynam-Gordon Co., 624 F.2d 379, 383 (1st Cir. 1980) (holding an EEOC investigation purportedly finding discrimination was incorrect).

[32] In order to prove bad faith, a lawyer can borrow principles from administrative subpoena precedent. For example, limiting the EEOC's investigative power was expressly recognized by the Supreme Court when Justice Marshall addressed the propriety of a Commission subpoena. EEOC v. Shell Oil Co., 466 U.S. 54, 65 (1984). In concluding that compliance with the notice requirement was a jurisdictional prerequisite for court enforcement of an EEOC subpoena, the Court noted that Congress did not intend for the Commission to possess "unconstrained investigative authority." *Shell Oil Co.*, 466 U.S. at 65. Thus, the proposition that the Commission does not have vast investigation powers supports the conclusions in *Dillard* that abuse of a court's process is bad faith. *Dillard Dep't Stores*, 1998 WL 25548, at *5. Thus, if it can be proved that the EEOC exceeded its investigative authority, this would be relevant to the argument that the Commission acted unreasonably.

1. Proving Bad Faith

With respect to all five conditions precedent established in 42 U.S.C. § 2000e-5(b), the EEOC bears the burden of proving that it has complied with its own regulations.[33] Conversely, a defendant must carry the heavy burden of establishing subjective bad faith, which will not be satisfied by general allegations.[34] A defendant's conclusory allegations are insufficient because courts are generally concerned that unsupported claims of bad faith hinder the administrative processes established by Congress.[35] Moreover, defendants have also undertaken to argue that proving several "indicia of bad faith" by the EEOC is adequate to show bad faith.[36] Although these attempts have historically proven futile, some courts have further intensified the burden on defendants by refusing to find bad faith when the Commission has proceeded in partial good faith.[37] On several occasions, the Commission has been indulged with unfettered latitude, and this refusal to hold the Commission accountable runs contrary to Congress's desire.[38]

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[33] *See* Dinkins v. Charoen Pokhank U.S.A,. Inc., 133 F. Supp. 2d 1237, 1241 (M.D. Ala. 2001). *Dinkins* is a recent case where the defendant moved for summary judgment against the EEOC on claims of systemic discrimination against women. 133 F. Supp. 2d at 1240. In adjudicating whether the EEOC had completed the investigation and conciliation requirements reasonably and in good faith, the court placed the initial burden of proof on the Commission. *Id.* at 1241. Ultimately, the Commission carried this burden as to sex discrimination claims; however, the court barred an Americans With Disabilities Act claim because the EEOC could not provide evidence that it attempted to conciliate the claim. *Id.* at 1242-46.

[34] EEOC v. Roadway Express, Inc., 580 F.Supp. 1063, 1067 (W.D. Tenn. 1984). Another important nuance to any aspect of challenging an EEOC charge is the difference in a facially valid claim and a factually valid claim. EEOC v. Roadway Express, Inc. 750 F.2d 40, 42 n.1. (6th Cir. 1984). In making the distinction, a court "should examine a charge to make sure that it is facially valid, but it need not go beneath the face of the charge to make factual determinations." *Id.* This fine line limits what a defense attorney can successfully challenge when arguing that a valid charge does not exist because of EEOC misconduct. *Id.*

[35] *Roadway Express*, 580 F. Supp. at 1066. In *Roadway Express*, the defendant attempted to show bad faith by proving an investigator had personal bias towards the defendant employer. *Id.* The court rejected the allegation and stated that "in addition to making specific factual allegations of bad faith, [the defendant] must put in 'issue the good faith of the agency seeking enforcement, not simply the particular agent who managed the proceedings.'" *Id.* Similarly, another district court rejected allegations of EEOC bad faith because the information sought by the investigator was relevant to the charge. EEOC v. New Prime, Inc., 2002 WL 1377789, at *5 (W.D. Mo. 2002).

[36] EEOC v. Quad/Graphics, Inc., 868 F.Supp. 1078, 1082 (E.D. Wis. 1994). In *Quad/Graphics*, the defendant specifically pled the EEOC's actions constituted "substantial indicia of bad faith" and that this should fulfill the defendant's heavy burden. *Quad/Graphics*, 868 F.Supp. at 1082. The so-called indicia consisted of

B. The Investigation Prong: Reasonable Investigation Rule

The investigation requirement is a critical step because respondents are particularly sensitive to Commission misconduct while agency officers enter their workplaces and gain access to internal information. Few courts have ventured to establish a workable, definitive standard for identifying unreasonable investigations and, as a result, a reluctance to chastise the EEOC for disingenuous investigations has emerged.[39]

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the fact that investigators used erroneous statistical information to support the charge, made a broad demand for information, and made threats to the employer. *Id.* at 1083. Although the existence of an ulterior motive or improper purpose can be inferred, the court rejected the indicia argument because the defendant had not presented specific facts or evidence linking the Commission's investigation to any of the allegedly bad acts. *Id.*

[37] EEOC v. Michael Constr. Co., 706 F.2d 244, 251 (8th Cir. 1983). The Eighth Circuit reversed a district court's finding of a bad faith investigation although the EEOC conceded that the investigation was pursued for the purpose of forcing a settlement. *Id.* The court found that as long as the agency's specialist investigating the charge pursed the investigation "at least partially" with a legitimate motive, bad faith would not be inferred. *Id.* Since attempting to achieve settlement is a legitimate function of the Commission, the only way the EEOC's investigation would be deemed invalid was if bad faith was the sole purpose of the investigation. *Id.* at 252.

[38] It is worth qualifying the use of the word "discretion" prompting most courts' reluctance to intervene in the administrative process. Courts rightfully assume the presumption that the agency has acted in "rationally and in good faith." Swift v. United States, 318 F.3d 250, 253 (D.C. Cir. 2003). In all actuality, however, courts may be giving the EEOC a flavor of "prosecutorial discretion." *See generally* Heckler v. Chaney, 470 U.S. 821, 830 (1985) (holding that when no "judicially manageable standards" are readily determinable, an administrative action will be absolutely shielded from judicial review). The discretion line of cases are not exactly applicable to the EEOC because Title VII, at most, implicitly grants the Commission discretion to execute its statutory and regulatory requirements. Johnson v. Robison, 415 U.S. 361, 373-74 (1974) (emphasizing requirement that legislature must be clear in preventing judicial review).

[39] Stehle v. Gen. Mills Rest., Inc., 875 F. Supp. 320, 322-23 (D. S.C. 1994) (discussing uncertainty among federal courts in evaluating the EEOC investiga-

In fact, there is no set limit on the potential breadth of an EEOC investigation because the only real guidance is provided by the words "good faith" and "reasonable."[40] For example, the EEOC has the de facto power to enter a workplace and interview employees concerning a charge without first obtaining the employer's permission,[41] investigate before formal

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tions); EEOC v. Sears, Roebuck and Co., 490 F. Supp. 1245, 1253 (M.D. Ala. 1980) (assessing that under any standard, judicial review should balance the interest in protecting employers from "unfounded charges and harassment" against amount the employer was prejudiced by EEOC's misconduct); *see also Michael Constr.*, 706 F.2d at 247 (characterizing the standard as requiring a showing of "subjective bad faith"). Although decided before Title VII was amended, the following proposition still rings true: "[the] Equal Employment Opportunity Commission cannot engage in [a] 'wholesale fishing expedition'" in its investigation of a charge of discrimination in employment. Parliament House Motor Hotel v. EEOC, 444 F.2d 1335, 1339 (5th Cir. 1971). Considering the unique characteristics of each investigation, the decision of investigative intent is clearly one to be made on a case-by-case basis.

[40] EEOC v. Klingler Elec. Corp., 636 F.2d 104, 107 (5th Cir. 1981). The Commission's duties are not specifically defined. *Klingler Elec.*, 636 F.2d at 107. The central inquiry under the amorphous standard is whether the EEOC has acted with "responsiveness and reasonableness" under the circumstances. *Id.* The EEOC is under no obligation to perform an "exhaustive investigation, nor prove discrimination to the employer's satisfaction." EEOC v. Equicredit Corp. of Am., 2002 WL 31371968, at *3 (E.D. Pa. 2002). In fact, the statutory requirements are met by simply making a "reasonable effort." *Id.* Some practitioners hold that the standards have manifested in a dramatic trend favoring the charging party. Troutman, *supra* note 27, at 1. For example, in 2001, the results favoring the charging party increased by over twenty percent, and this fact combined with the increase in litigation is a "disquieting trend [that] appears to be emerging." *Id.* The most recent amendment of the *EEOC Compliance Manual* reflects efforts to put even more discretion into the hands of investigators since it allows the investigator to determine "threshold issues," which are the requirements that an individual must meet to initiate suit. *EEOC Revises Its Compliance Manual*, IN BRIEF, (Feldman, Franden, Woodard & Farris, Tulsa, OK, June 15, 2000), at 1. This discretion favors the charging party because it allows an officer whose career is predicated on prosecuting employers to make a decision affecting whether a person can sue an employer.

[41] 29 C.F.R. § 1601.15-1601.20 (2003). Employee interviews on the work site without the employer's permission is another event that employers often use to show to show an improper purpose. EEOC v. Hearst Corp., 103 F.3d 462, 463 (5th Cir. 1997). In *Hearst*, two employees filed sexual harassment charges with the EEOC alleging sexual harassment, and the EEOC responded by requesting permission to conduct an on-site investigation to interview employees. *Hearst*, 103 F.3d at 463. The employer denied the requests and the EEOC circumvented their decision by issuing two administrative subpoenas demanding testimony of the employees. *Id.* The authority for such an action are clearly contained in the

charges are even filed[42] and, under the analogous administrative subpoena line of cases, to investigate charges not yet alleged by the employee.[43]

1. Is the Investigation a Condition Precedent or Jurisdictional Prerequisite?

Although the importance of proper investigation is unanimously recognized by federal courts,[44] the exact language

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EEOC Compliance Manual:

> 25.1: EEOC representatives [may] enter and inspect respondent's facilities to examine and copy records and conduct interviews.
>
> 25.2(b)(2): If the respondent refuses to permit the on-site investigation, seek an access subpoena to enter and inspect the respondent's facilities, examine and copy evidence, and interview employees.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, COMPLIANCE MANUAL, Vol. 1 § 25.0001 (2001).

[42] *See* 29 C.F.R. § 1626.4 (2003) ("The Commission may, on its own initiative, conduct investigations of employers."). While this "preemptive" ability probably deters some unlawful practices, it grants EEOC judgment significant authority.

[43] Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970) (allowing plaintiffs to prosecute claims "'like or related to allegations contained in the charge and growing out of such allegations during the pendency of the case before the Commission'"); *see also* EEOC v. General Electric Co., 532 F.2d 359, 365-66 (4th Cir. 1976) (stating that public policy did not require agency investigators to "cast a blind eye over such discrimination" not alleged in charge). Relying on this premise, the Eighth Circuit adopted *Sanchez* and stated that the EEOC can investigate facts "which reasonably can be expected to grow out of the investigation triggered by the charge." EEOC v. Delight Wholesale Co., 973 F.2d 664, 668 (8th Cir. 1992). For example, in *EEOC v. Crown Liquors of Broward, Inc.*, the initial claim alleged racial discrimination in hiring and discharge, and after the investigation, the EEOC added a charge of "across the board racial discrimination." 503 F. Supp. 330, 332 (S.D. Fla. 1980). The "like or related" test led the court to the logical result that an investigation of hiring and firing practices could reasonably lead the agency to investigation of other racial discrimination. *Crown Liquors*, 503 F. Supp. at 333. Although the rule generally expands EEOC power, in some circumstances it has served as a meaningful limit on impermissibly increasing the scope of an investigation. *See, e.g.,* Vela v. Village of Sauk, 218 F.3d 661, 664 (7th Cir. 2000).

[44] *See* EEOC v. Brookhaven Bank & Trust Co., 614 F.2d 1022, 1026 (5th Cir. 1980) (Reavley, J., dissenting) (asserting that "[c]onscientious adherence to the statutory prerequisites is more than an exaltation of form over substance. The language of the statute insures that trifles do not become subjects of EEOC suits and that employers are not harassed by an overzealous EEOC staff."); EEOC v. Western Elec. Co., 382 F. Supp. 787, 801 (D. Md 1974) (announcing that "the court [was] disturbed by the Commission's attitude that most of the issues

used to describe the obligations varies depending on the jurisdiction. The majority position classifies the reasonable investigation requirement as a "condition precedent" to a Title VII lawsuit.[45] In the alternative, some courts have strictly construed the good faith element as a "jurisdictional prerequisite," whereby a court does not have subject matter jurisdiction unless the EEOC has conducted a reasonable investigation.[46]

Truvillion v. King's Daughters Hospital[47] is considered the first landmark case on this subject because the Fifth Circuit held that the investigational requirement was a condition precedent to reaching a case's merits.[48] The *Truvillion* court

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raised . . . are purely technical").

[45] Dinkins v. Charoen Pokphaud U.S.A., Inc., 133 F. Supp. 2d 1237, 1241-42 (M.D. Ala. 2001) (characterizing investigation requirement as condition precedent to finding cause); EEOC v. Westvaco Corp., 372 F. Supp. 985, 991 (D. Md. 1974) (holding that conciliation does not affect jurisdictional analysis). Other statutory requirements of the Commission, albeit very different from investigation, such as the timely charge, have been described by the Supreme Court as "a requirement . . . like a statute of limitations," which is more like a condition precedent, as opposed to a jurisdictional prerequisite. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982). A court will hear a case has an expired statute of limitation; on the other hand, if a court did not have jurisdiction it could not even entertain a challenge to the merits.

[46] EEOC v. Pierce Packing Co., 669 F.2d 605, 608 (9th Cir. 1982) (holding that genuine investigation is jurisdictional condition precedent); *see also* Cook v. City of Pomona, 70 F.3d 1277, 1277 (9th Cir. 1995) (affirming *Pierce Packing* and dismissing EEOC case because step was not completed, thus court lacked subject matter jurisdiction); EEOC v. E. I. DuPont de Nemours & Co., 373 F. Supp. 1321, 1333 (D. Del. 1974) (stating that "[t]he Commission's functions of investigation, decision of reasonable cause and conciliation are crucial to the philosophy of Title VII. It is difficult to believe that Congress directed the Commission to make a determination of reasonable cause on the merits of a charge and nevertheless contemplated that the Commission could institute such litigation before it makes such a determination.").

[47] 614 F.2d 520 (5th Cir. 1980).

[48] *Truvillion*, 614 F.2d at 524. The Commission's requisite good faith investigation "in a loose sense might be treated as jurisdictional. They are, however, nothing more than procedural prerequisites to the court's determination of the substantive issues." *Id.* One explanation for the varying use of the term "jurisdictional" may be that it "does not carry the same meaning in every context in which it is employed. Nilsen v. City of Moss Point, 674 F.2d 379, 382 (5th Cir. 1982). The court distinguished the meaning of jurisdiction for res judicata purposes and jurisdiction to "continue to entertain the action" to assess the affect of a dismissal for failing to meet timeliness requirements. *Nilsen*, 674 F.2d at 382.

reasoned that appropriate investigation and conciliation are necessary to a prima facie case. Another panel of Fifth Circuit judges, in *Harris v. Amoco Production Co.*,[49] attempted to further distance the statutory investigation duty from being characterized as "jurisdictional" when it found that the requirement was more "procedural" in nature.[50] On the other hand, the Ninth Circuit announced an alternative approach when it held that a "genuine investigation" is a jurisdictional requirement requiring dismissal for lack of subject matter jurisdiction.[51] In taking this stance, the court reasoned that Congress' intent could not be construed to allow a court to entertain a lawsuit when the Commission has not investigated in accordance with Title VII.[52]

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[49] 768 F.2d 669 (5th Cir. 1985).

[50] *Harris*, 768 F.2d at 679. Five years after *Truvillion*, the Fifth Circuit revisited the issue and attempted to clarify the ramifications of its landmark holding. *Id.* The court plainly stated that it was acting consistent with Supreme Court precedent in considering administrative prerequisites "procedural" rather than "jurisdictional" in nature. *Id.* (referring to *Zipes*, 455 U.S. at 385 and Love v. Pullman, 404 U.S. 522 (1972)). The failure of the EEOC to investigate *usually* means that a plaintiff cannot bring suit; it does not mean that a trial court lacks subject matter jurisdiction. *Id.* at 680. As discussed in the remedies section below, it is reasonable to conclude that calling the investigation a "jurisdictional prerequisite" or a "condition precedent" has the same general outcome of hindering a plaintiff's claim, however, the language may have an affect on the precise procedural options available to a defendant. *Id.* at 679-80 n.18. It should also be duly noted that the court laboriously attempted to reconcile *Harris* and *Truvillion* in order to conclude that it is "not inconsistent to characterize as 'jurisdictional' for res judicata purposes the same statutory prerequisites that we today characterize as 'procedural.' " *Harris*, 768 F.2d at 679-80 n.18.

[51] *Pierce Packing*, 669 F.2d at 609. In *Pierce*, the court was deliberate in reasoning that it did not have subject matter jurisdiction over the controversy because the EEOC did not comply with Title VII. *Id.* Furthermore, the court did not allow the Commission to cure its previous mistakes by later attempting settlement because this would amount to, what the district court deemed as, "leapfrogging all jurisdictional requirements of Title VII." *Id.* The circuit court reasoned, "[j]ust as it is futile to 'lock the barn after the horse has escaped,' the EEOC's justifications and explanations on appeal are inadequate to cure the flaws which confronted the district court. The only cure is to follow the guidelines of Title VII." *Id.* The Ninth Circuit opinion, although a minority view, approaches the problem from a fair perspective to all parties. The EEOC is well aware of their own regulations, and if they want to sue then they must comply with them.

[52] *Id.* at 608 (citing authority for proposition that "[t]he Commission's functions of investigation, decision of reasonable cause and conciliation are crucial to the philosophy of Title VII. It is difficult to believe that Congress directed the

At first glance, the distinction appears circular in the sense that similar outcomes result under both approaches; however, this is not necessarily the case. Courts should seriously consider the pragmatic implications of applying a condition precedent theory because a dismissal would ensure more meaningful procedural remedies for employers and lessen the abundance of arguably unripe cases on the federal docket.[53] As discussed below, the distinction dictates, *inter alia*, which Rule 12 dismissal is available; and under the jurisdictional approach, employers are able to seek earlier, less costly dismissals without having to engage in discovery. Sanctions may also be easier to obtain under the jurisdictional approach, which is possibly the most effective solution in deterring EEOC misconduct. From the perspective of human resource departments and small businesses, the distinction is anything but trivial.

C. The Conciliation Prong: Good Faith Requirement

In the multi-step process employed by the EEOC, after the reasonable cause determination, the Commission must complete its final administrative task: good faith conciliation.[54] Conciliation is of importance because it facilitates

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Commission . . . [to] institute such litigation before it makes such a determination."). *Id.*

[53] *See* Edwards v. Dep't of the Army, 708 F.2d 1344, 1346-47 (8th Cir. 1983) (entertaining argument by appellant that adherence to Title VII procedures "renders the cause ripe for review in the court"); EEOC v. Sherwood Med. Indus., 452 F.Supp 678, 684 (N.D. Fla. 1978) (describing suit on unconcilated claim as "premature"); Higginbottom v. Home Ctrs., Inc., 1975 WL 214, at *2 (N.D. Ohio 1975) (evaluating the ripeness of EEOC charge not timely filed). The ripeness doctrine seems particularly applicable to the Title VII scenarios discussed because the rule does not allow controversies that are premature to reach the courts. *See also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.4.1, 114-15 (3d ed. 1999). The possibility of courts "entangling themselves in abstract disagreements" between the Commission, an employer, and an allegedly aggrieved employee are realistic concerns. *Id.* at 117 (quoting in pertinent part from Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967)). Therefore, in addition to the other arguments outlined below, it would not be frivolous to defend a claim stating that the controversy has not properly ripened to allow judicial involvement.

[54] EEOC v. Allegheny Airlines, 436 F. Supp. 1300, 1305-06 (W.D. Pa. 1977). In *Allegheny Airlines*, an airline company was sued under Title VII based on its refusal to hire a male flight attendant. *Allegheny Airlines*, 436 F. Supp. at 1301. The defendant challenged both the investigation and conciliation actions taken by

Congress's desire for parties to utilize informal efforts in order to resolve matters without court involvement.[55] Courts describe satisfaction of this duty in various terms, however, it is generally accepted that the EEOC must make some type of "real attempt" at conciliation.[56] To satisfactorily conciliate, courts generally require: (1) an explanation of why the Commission believes an unlawful employment practice has occurred, (2) an opportunity for the employer to comply with the statute and (3) a response "in a reasonable and flexible manner" with respect to the disposition of the employer.[57]

Conciliation has been referred to as "quasi-jurisdictional,"[58] more precisely it is best described as an affirmative

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the EEOC, and the court found that with respect to the events listed in the complaint the Commission acted in good faith. *Id.* at 1304-06. When the court makes its inquiry into the presence of good faith in the investigative process, a court should avoid "examin[ing] the details of the offers and counteroffers between the parties, nor impose its notions of what the agreement should provide." EEOC v. Zia Co., 582 F.2d 527, 533 (10th Cir. 1978). These courts advocate allowing the EEOC to operate autonomously during conciliation. *Zia Co.*, 582 F.2d at 533. While this may increase the opportunity for the Commission to cut corners in negotiation, a hands-off approach in this context may indeed be more conducive to voluntary settlement.

[55] 42 U.S.C. § 2000e-5(f)(1) (1994); *see also Sherwood Med. Indus.*, 452 F. Supp. at 682 (postulating that statutory requirement of conciliation as a condition precedent to suit has no conceivable exceptions).

[56] EEOC v. Equicredit Corp. of America, 2002 WL 31371968, at *3 (E.D. Pa. 2002). In another illustrative case, the Commission rejected repeated requests for conciliation meetings and ignored the offer by the employer to accept virtually all of the remedies proposed in the settlement. EEOC v. Pac. Mar. Ass'n, 188 F.R.D. 379, 380 (D. Or. 1999). The court found that the correspondence by the EEOC investigator was not, by itself, a good faith attempt at conciliation. *Pac. Mar.*, 188 F.R.D. at 381. Although the court found bad faith, the action was only stayed for ninety days in order for the EEOC to resume conciliation attempts in good faith. *Id.* This "slap on the wrist" was exactly what the Ninth Circuit envisioned in *Pierce Packing* when it applied a jurisdictional theory to EEOC requirements. In practice, staying a case, as was done in *Pacific Maritime*, will have little or no deterrent value, which fails to create a real incentive to do the job right the first time.

[57] EEOC v. Dolphin Cruise Line, Inc., 945 F. Supp. 1550, 1556 (S.D. Fla. 1996). "[T]he Commission shall attempt to achieve a just resolution of all violations found and to obtain agreement that the respondent will eliminate the unlawful employment practice and provide appropriate affirmative relief." 29 C.F.R. § 1601.24(a) (2003).

[58] EEOC v. Rymer Foods Inc., 50 Fair Empl. Prac. Cas. (BNA) 787 (N.D. Ill. 1989)

statutory obligation of the EEOC.[59] Although conciliation is of the utmost importance to the scheme of EEOC suits, the requirement has been looked upon with a different perspective in subsequent lawsuits filed by an individual plaintiff.[60] While a total failure is "fatal" to a charge filed by the EEOC,[61] it is not a prerequisite to a suit filed by a plaintiff in his or her *individual capacity*.[62] This is most likely because an alleged victim of discrimination should not be punished for actions of a third-party agency. Such reasoning has merit considering that the EEOC is overworked and overburdened[63] by the number of claims investigated annually, and concededly, it is unrealistic to expect perfection.[64] Regardless of the huge workload, there is no excuse for bad faith attempts at conciliation or no attempts at all.[65]

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[59] In *Sears*, the court did not rule on whether the duty of conciliation was jurisdictional in nature, but it stated that even if it was considered a "non-jurisdictional condition precedent," failure to conciliate cannot be cured after a lawsuit is initiated. *EEOC v. Sears, Roebuck & Co.,* 490 F. Supp. 1245, 1258 (M.D. Ala. 1980). Just as courts have been ambiguous in classifying investigation requirement, conciliation has also occasionally been described as jurisdictional. *See* EEOC v. Gen. Motors Corp., 826 F. Supp. 1122, 1127 (N.D. Ill. 1993) (stating that since Commission fulfilled statutory requirement of conciliation, court had proper jurisdiction).

[60] EEOC v. Zia, Co., 582 F.2d 528, 533 (10th Cir. 1978). On a practical note, conciliation attempts are typically the most successful when the informal agreement prevents a suit in district court. Kelly Koenig Levi, *Post Charge Title VII Claims: A Proposal Allowing Courts To Take 'Charge' When Evaluating Whether To Proceed or To Require a Second Filing*, 18 GA. ST. U. L. REV. 749, 755 (2002). Although it may be the case that conciliation is more effective when done to prevent lawsuits, the attempts can continue throughout investigation and discovery. *Id.*

[61] EEOC v. Hickey-Mitchell Co., 507 F.2d 944, 945 (8th Cir. 1974) (dismissing an EEOC suit for failure to conciliate even when employer ignored attempts at conciliation by Commission). EEOC v. Humko Prod. Div. of Kraftco Corp., 402 F. Supp. 1076, 1077 (W.D. Tenn. 1975) (holding that complete failure of EEOC to conciliate does in fact bar suit by Commission); *compare Pac. Mar. Ass'n*, 188 F.R.D. at 381 (granting the EEOC ninety days to make sufficient conciliation efforts).

[62] EEOC v. Sherwood Med. Indus., 452 F.Supp. 678, 684 (M.D. Fla. 1978). In *Sherwood*, the EEOC filed a racial discrimination suit after conciliation efforts failed and the Commission included sexual harassment claims that had not been conciliated. *Sherwood Med. Indus.*, 425 F. Supp. at 680-81. The issue was whether the EEOC had to attempt conciliation on both the sex and race discrimination claims. *Id.* Chief Judge Young stated that Congress intended the statutory requirements to be more than an "empty formality," and that in order for judicial resolution to be the absolute last resort, informal settlement attempts had to be attempted on both claims. *Id.* at 683. Additionally, the court stated that "the only construction of the statute which is at all in harmony with the Congressional desire for conciliation is that the Commission's authority to sue is conditioned upon full compliance with the administrative process—investigation, determination, and conciliation—, with respect to each discriminatory practice alleged." *Id.*

III. THE MYRIAD OF POTENTIAL REMEDIES

After recognizing that the seemingly straightforward provisions of Title VII have resulted in various responses to EEOC misconduct, it is not surprising that the application of the well-settled principles, such as dismissal, have resulted in starkly different outcomes in this context. This section addresses common procedural devices considered when challenging improprieties during investigation and conciliation including: (1) affirmative defenses, (2) motions to dismiss, (3) motions for summary judgment, (4) counterclaims and (5) motions for attorney's fees.

A. Threshold Requirement

The starting point for a defendant who believes the Commission has not acted in good faith is to plead the allegation as an affirmative defense.[66] Proper pleading in the defendant's answer is crucial because it preserves the availability of several of the remedies discussed below.[67] One approach has been to allege that the EEOC violated Title VII by performing an unfair, biased investigation.[68] Conversely, in *EEOC v. Sears, Roebuck, and Co.*,[69] the defendant asserted that a pattern of EEOC misconduct cumulatively amounted to bad faith and that it was deprived of proper notice, investigation and conciliation.[70] The district court struck the harassment-based affirmative defense and noted that although the behavior was "reprehensible," EEOC harassment is not an affirmative defense to a Title VII action.[71] Nevertheless, it recognized the defense based on statutory noncompliance.[72]

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[63] The Commission itself has recognized the valid concerns of its own workload. U.S. EEOC, "*Special Meeting of the EEOC to Consider Recommendations of the Charge Processing Task Force*," directive No. 6, Apr. 19, 1995. The directive recommended settlement in "all stages" because of a backlog in cases. *Id.*

[64] The Commission also has a backlog of over 30,000 cases, and while this number is on the decline, the average time of processing is around six months. *California Labor & Employment Law Update*, AGENCY UPDATE (Seyfarth Shaw Newsletter, Los Angeles, CA) March 2002 at 1. In fact, the Commission receives approximately 80,000 charges every year. U.S. Equal Employment Opportunity Commission, EEOC Overview (2003), *available at* http://www.eeoc.gov/stats/overview.

[65] EEOC v. Sears, Roebuck & Co., 650 F.2d 14, 19 (2d Cir. 1981) (choosing to dismiss the case without prejudice when Commission abused its discretion in selecting conciliation methods). *But see* EEOC v. Klinger Elec. Corp., 636 F.2d 104, 107 (5th Cir. 1981) (holding that the EEOC's efforts to conciliate for over two years satisfied the good faith requirement).

[66] EEOC v. Dolphin Cruise Line, Inc., 945 F. Supp. 1550, 1556 (S.D. Fla. 1996) (recognizing that defendant can raise affirmative defense when EEOC has failed to complete conditions precedent). In *EEOC v. General Motors Corp.*, a

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charge was filed against GM because a company policy, commonly referred to as an "open door" policy, was not applied to a particular employee until his pending Title VII claim was resolved. 826 F. Supp. 1122, 1124 (N.D. Ill. 1993). Besides moving for summary judgment, GM also alleged in the form of an affirmative defense that the jurisdictional and administrative prerequisites to bring suit had not been fulfilled. *General Motors*, 826 F. Supp. at 1127.

[67] *See* FED. R. CIV. P. 8(c). Since the EEOC satisfies its obligations through proper notice pleading, the defendant waives objections as to the adequacy of Commission prerequisites by not timely objecting. EEOC v. Times-Picayune Publ'g. Corp., 500 F.2d 392, 392-93 (5th Cir. 1974).

[68] EEOC v. Kerrville Bus Co., 925 F.2d 129, 130 (5th Cir. 1991). The employer-defendant actually attempted to obtain relief under two procedural methods, the affirmative defense and the counterclaim. *Kerrville Bus Co.*, 925 F.2d at 130. The court only addressed the immediate appealability of the counterclaim's dismissal. *Id.* at 131-32.

[69] 490 F. Supp. 1245 (M.D. Ala. 1980).

[70] *Sears, Roebuck & Co.*, 490 F. Supp. at 1254. Chief Judge Varner spent a considerable portion of the opinion expressing the court's displeasure with the EEOC's defiance of their statutory regulations. *Id.* at 1253-54. In fact, he went as far to state the "this court is impressed with Sears' contention that the EEOC has engaged in a pattern of misconduct over the past six years which amounts to a display of general bad faith." *Id.*

[71] *Id.* at 1254. The Middle District of Alabama relied upon Fifth Circuit precedent to hold that the malicious prosecution affirmative defense did not relate to whether the employer unlawfully discriminated against an employee. *Id.* (citing favorably EEOC v. First Nat'l Bank of Jackson, 614 F.2d 1004, 1008 (5th Cir. 1980)). Since the court recognized the facts did not conclusively indicate EEOC bad faith, summary judgment was "inappropriate." *Id.*

[72] *Id.* at 1258. An important aspect of the court's holding is that the Commission can not attempt to conciliate some charges in an action and ignore others. *Id.* Citing EEOC v. International Brotherhood of Electrical Workers, 476 F. Supp. 341 (D.Mass. 1979), the court found dismissal of non-conciliated charges is the appropriate action. *Id.* Even more profoundly, the district court did not allow

The court's holding permitted the Commission harassment, but at a minimum it reflects the availability of a defense aimed towards an unfulfilled statutory condition.[73]

B. Moving To Dismiss

A motion to dismiss for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1) is another remedy available in circuits treating the lack of a good faith investigation as a jurisdictional prerequisite to a lawsuit.[74] This is a powerful remedy for employers because a defendant can assert the absence of subject matter jurisdiction at virtually anytime during the proceeding or it can be addressed *sua sponte* by the court.[75] Confusingly, motions to dismiss for lack of subject matter jurisdiction have been granted even in jurisdictions applying the condition precedent theory to EEOC misconduct.[76] These courts, although treating the requirement as a condition precedent, have concurred that they may not have

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the EEOC to cure the defects after the affirmative defense was successful. *Id.* Therefore, if the EEOC moves for a stay of proceedings under 42 U.S.C. 2000e-5(f)(1), the court should follow *Sears* and deny such a motion because the Commission must complete the requisites before commencing a lawsuit, not during the prosecution of one. *Sears, Roebuck*, 490 F. Supp. at 1258.

[73] EEOC v. Sherwood Med. Indus., 452 F.Supp. 678, 682 (N.D. Fla. 1978) (allowing defense for non-conciliated sex discrimination claim).

[74] EEOC v. Pierce Packing Co., 669 F.2d 605, 608 (9th Cir. 1982). The Ninth Circuit specifically supported the proposition that a motion to dismiss for lack of jurisdiction is the proper course of action. *Pierce Packing*, 669 F.2d at 608-09; *see* EEOC v. Bruno's Restaurant, 13 F.3d 285, 288 (9th Cir. 1993) (addressing district court's grant of dismissal when Commission failed to conciliate). Naturally, courts that do not consider the EEOC's requirements to be purely jurisdictional in nature will probably not entertain a Rule 12(b)(1) motion since those courts purport to have proper jurisdiction.

[75] FED. R. CIV. P. 12(h)(3). However, the long-term effectiveness of a dismissal is questionable given the gentle approach of many courts. *See, e.g.*, EEOC v. Burlington Northern, Inc., 644 F.2d 717, 720-21 (1981) (evaluating the prejudice to the employer and willfulness of EEOC action with respect to timeliness requirements); Smith v. Am. President Lines, Ltd., 571 F.2d 102, 107 n.8 (2d Cir. 1978) (considering compliance with timeliness aspects of Title VII viewed in the manner most favorable to underlying purposes of Title VII).

[76] Dinkins v. Charoen Pokphand U.S.A., Inc., 133 F. Supp. 2d 1237, 1241-42 (M.D. Ala. 2001). In *Dinkins*, the Eleventh Circuit characterized the EEOC steps as conditions precedent, and the court found jurisdiction over all issues except an ADA claim. *Dikins*, 133 F. Supp. 2d at 1242.

"jurisdiction" over improperly conciliated discrimination claims.[77] In any case, the dismissal will be without prejudice, which limits the effectiveness of this procedural device because it allows the Commission to regroup and cure its deficiencies.[78]

Some commentators consider a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted a more appropriate basis for resolution when inadequate conciliation efforts have been made.[79] In general, the problem a motion to dismiss presents is that, more times than not, it will require evidence outside the pleadings in order to prove bad faith.[80] The Federal Rules state that when material outside the pleadings is considered, courts will consider the motion one for summary judgment, and, as discussed below, summary judgment is not a defendant-friendly standard for reviewing an EEOC procedural defect.[81] Typically, courts facing this circumstance simply couch their opinions in language resolving the motion to dismiss under the summary judgment standard.[82]

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[77] *Zia Co.*, 582 F.2d at 533. The Tenth Circuit specifically addressed this practice when it stated that "[t]hese courts . . . speak in terms of the defect being jurisdictional. But often they do assert continuing authority over the matter." *Id.* In *EEOC v. Westvaco Corp.*, the Commission did not timely determine reasonable cause and they did not engage in conciliation. 372 F.Supp. 985, 991 (D. Md. 1974). The court stated that the deficiencies were more attributable to failing to state a claim than subject matter jurisdiction. *Westvaco Corp.*, 372 F.Supp at 991.

[78] EEOC v. Sears, Roebuck, & Co., 490 F. Supp. 1245, 1258 (M.D. Ala. 1980) (holding that based on *Truvillion*, 614 F.2d at 522 and Costello v. United States, 365 U.S. 265, 284-88 (1961) dismissal would be without prejudice because dismissal was for lack of jurisdiction). Of course, the availability of restarting the process depends on the statutory timeliness requirement.

[79] Note, *Judicial Responses to the EEOC's Failure to Attempt Conciliation*, 81 MICH. L. REV. 433, 452 (1982). The main advantage of taking the route of failure to state a claim is that it avoids "the problematic nature of the jurisdictional analysis." *Id.* Concededly, this approach is not the most narrowly tailored solution because the Federal Rules do not provide for a "failure to satisfy preconditions to suit." *Id.* n.111. Until the rules are modified to reflect such a provision, which is unlikely to occur, practitioners should tie in the allegations under traditional procedural remedies. *Id.*

[80] *Id.* at 452-53. This problem arises because the Commission will inevitably claim that they have complied with their statutory prerequisites and, therefore, outside evidence will be necessary for rebuttal. *Id.* at 453. This raises another interesting question: if the EEOC is required to affirmatively plead jurisdiction, does it have to specifically cite instances where the requirements *are* fulfilled? The answer is no after the "authoritative judicial interpretation" in EEOC v. Standard Forge & Axle Co., 496 F.2d 1392, 1395 (5th Cir. 1974), general averments by the Commission are sufficient. EEOC v. Metro. Atlanta Girls' Club, Inc., 416 F. Supp. 1006, 1012 (N.D. Ga. 1976).

C. Moving for Summary Judgment

A motion for summary judgment is another device frequently relied upon by defense litigators, and it may be pursued in limited circumstances given proper completion of the threshold requirement.[83] For example, in *EEOC v. Admiral Maintenance Services*,[84] an employer-defendant moved for summary judgment asserting that the Commission failed to conciliate in good faith.[85] Instead of ruling for the defendantmovant, the court granted the EEOC partial summary judgment because the facts revealed that the Commission acted in good faith.[86] In general, courts have been extremely hesitant to grant summary judgment based on EEOC misconduct because the purposes of Title VII are undermined when a defendant is dismissed for a third party's procedural defects.[87] This policy consideration has been considered so significant that winning summary judgment on the grounds of a bad faith investigation or conciliation is arduous at best.

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[81] FED. R. CIV. P. 12(b) ("on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56").

[82] *See, e.g.*, Hutcherson v. Lehtin, 313 F. Supp. 1324, 1330 (N.D. Cal. 1970) (stating, in a non-EEOC case, "defendants' motion to dismiss, treated as a motion for summary judgment as allowed by Rule 12(b) . . . should be and is hereby granted under Rule 56(b)").

[83] See EEOC v. Zia, 582 F.2d 527, 532 (10th Cir. 1978) (entertaining a motion for summary judgment based on conciliation defects although the court ultimately held that some attempt at conciliation fulfills the Commission's requirements). In fact, the Middle District of Alabama granted summary judgment in an analogous ADA case when it did not have jurisdiction over claims unnoticed in the reasonable cause letter. *Dinkins*, 133 F. Supp. 2d at 1246.

[84] 1998 WL 102748, at *1 (N.D. Ill. 1998). The defendant in *Admiral* claimed that the Title VII charges were due to be dismissed since the Commission failed to conciliate in good faith. *Admiral*, 1998 WL 102748, at *1. Consequently the EEOC also moved for summary judgment as to the same substantive claims that the employer-defendant has preserved in his affirmative defense. *Id.* While the exact bases for Admiral's assertions are irrelevant to the analysis of whether summary judgment is a viable option, the defendant claimed that the EEOC's efforts were unreasonable due to a delay in efforts to settle. *Id.* at *8-9. The court found that the initial efforts by the Commission were futile, but its acts fulfilled their statutory requirement under the liberal standard announced in EEOC v. Sears Roebuck & Co., 504 F. Supp. 241, 262 (N.D. Ill. 1980). *Id.* at *11. While the public policy heavily tilts the analysis against the option of summary judgment, the *Admiral* opinion is helpful only in the fact that it shows the option is available to some degree.

[85] *Id.* at *1. The Eastern District of Pennsylvania also entertained a motion

D. Initiating a Counterclaim Against the EEOC

Another remedy an employer would logically consider when faced with EEOC misconduct is a counterclaim against the Commission itself.[88] First and foremost, employers are

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for summary judgment where the defendant argued that the EEOC failed to attempt conciliation in good faith. EEOC v. Equicredit Corp. of Am., 2002 WL 31371968, at *1. In addition, the defendant claimed that the EEOC did not exhaust its administrative remedies by failing to investigate a claim that involved a second allegedly aggrieved employee. *Id.* at *5. The court denied the motion for summary judgment because the facts did not support such a motion; however, the court did not express any concerns with the summary judgment remedy in a situation where there was still no genuine issue of material fact. *Id.* at *4-6.

[86] *Admiral*, 1998 WL 102748, at *11-12. The court heavily considered the fact that the EEOC gave the employer several opportunities to negotiate. *Id.* at *12. A harsh lesson learned from *Admiral* is that when an employer attempts to "draw a line in the sand" and make a nonnegotiable offer, the Commission's efforts are not going to be scrutinized since the employer is deemed to have prevented conciliation. *Id.*

[87] *See* EEOC v. Western Publ'g Co., 502 F.2d 599, 603 (8th Cir. 1974) (hypothesizing that Commission's requirements should be construed broadly in order to observe "humanitarian purposes" in which Title VII was created).

[88] It is helpful to consider the issue of sovereign immunity concurrently with a lawsuit against an agency of the federal government. The United States can only be sued when the government consents to a lawsuit by provision of statute or when it institutes a lawsuit where the defendant can assert a counterclaim. *See* United States v. Shaw, 309 U.S. 495 (1940) (discussing governmental immunity in context outside labor dispute). Actions against the government are limited in several aspects, specifically, counterclaims against the government are limited to a certain monetary amount and the amount sought must not be greater than that sought by the United States. 20 AM. JUR. 2D *Counterclaim, Recoupment, and Setoff* § 70 (2003). Under the Federal Tort Claims Act, certain torts are actionable against the United States and the statute contains several exceptions that may be crafted to include a counterclaim. 28 U.S.C. § 2680 (1994). As applied to the EEOC context, immunity may in fact prevent some counterclaims. *See infra*

not within the category of "aggrieved individuals" who are able to invoke the protections of Title VII.[89] Furthermore, *EEOC v. First National Bank of Jackson*,[90] and its progeny from courts within the Fifth Circuit,[91] have greatly limited counterclaiming with allegations that improprieties in the investigation constitute a violation of Title VII.[92] Moreover, the Fifth Circuit specifically held that "an employer may not counterclaim . . . based on tort claims."[93] Additionally, public policy considerations "required" dismissal of all counterclaims by a defendant in a district court applying *First National*

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notes 62-65 and accompanying text. The same problems with a counterclaim may not exist under the Administrative Procedure Act. The prospect of a counterclaim also tangentially implicates the standing doctrine. It is long understood that to have standing the plaintiff must have (1) an injury, (2) traceable to the defendant, (3) that is redressable by the court. Northeastern Florida Contractors v. City of Jacksonville, 508 U.S. 656, 663 (1993). At least one scholar has expressed the concern that even if the EEOC could be held responsible for its misconduct, a plaintiff would lack standing to assert claims because of the redressibility prong of the analysis. A respondent would be partially redressed by monetary damages for his or her time. Another possible remedy would be if only the individual plaintiffs were allowed to continue with the lawsuit.

[89] Pima County Cmty. Coll. Dist. v. EEOC, 409 F. Supp. 1061 (D. Ariz. 1976). The Supreme Court has held that their is no right to contribution for employers under Title VII. Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 90 (1981).

[90] 614 F.2d 1004 (5th Cir. 1980).

[91] The counterclaim line of cases that were influenced by *First National Bank* are *EEOC v. Kerrville Bus Co.*, 825 F.2d 129 (5th Cir. 1991) and *Giles v. Roadway Express, Inc.*, 529 F.Supp. 37 (S.D. Miss. 1981).

[92] *Kerrville Bus*, 925 F.2d at 131. In addition, the defendant's counterclaims alleged a violation of the Administrative Procedure Act and the Fifth Amendment. *Id.* In lieu of monetary damages, the defendant sought a permanent injunction and declaratory judgment dismissing the claims against it and prohibiting future suits on the same facts. *Id.* The trial court actually held that it did not have jurisdiction over the counterclaims and that it was also barred from deciding the case under the doctrine of sovereign immunity. *Id.*

[93] *First Nat'l Bank*, 614 F.2d at 1006. In *First National Bank*, the bank-respondent attempted to analogize the investigative nature of the EEOC to law enforcement's ability to conduct searches and seizures. *Id.* at 1008. Although the Fifth Circuit rejected the argument, they dismissed the counterclaim because it arose out of a different transaction or occurrence. *Id. First National Bank* demonstrates courts' refusal to recognize the defense of harassment or malicious prosecution for failing to comply with administrative regulations because such an assertion does not relate to whether the employer engaged in unlawful employment practices. *Id.*

Bank.[94] In light of these decisions it is unlikely that a counterclaim against the EEOC is a viable option under current law.

E. Recovering Attorney's Fees

A "prevailing defendant"[95] in a Title VII discrimination suit can obtain attorney's fees if the EEOC's case was "frivolous, unreasonable, or without foundation."[96] The current standard is extremely narrow and is not a deterrent to the EEOC or private plaintiffs. If the facts of a particular matter support arguments for attorney's fees, the Commission will be held liable as a private person.[97] In addition, district courts are given generous leeway in assessing whether to penalize the EEOC.[98] Although the judiciary is clearly given the ability to make such a ruling, the *Christiansburg* standard has been applied sparingly, which means an allegation later found legally insufficient is not enough to grant a motion for attorney's fees.[99] At least one appellate court has expressly discouraged this practice when it held that if there is "some basis" for the EEOC to find reasonable cause, then attorney's fees should not be granted.[100]

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[94] *Giles*, 529 F.Supp. at 39. The district court did not expand on the specific policy arguments it considered, but the opinion did express the importance public policy played in its reliance upon *First National Bank. Id.*

[95] The proper procedural posture for such an action is a defendant's motion pursuant to 42 U.S.C. § 2000e-5(k). EEOC v. Kenneth Balk & Assoc., Inc., 813 F.2d 197, 198 (8th Cir. 1987)

[96] Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978); *see also Kenneth Balk & Assoc., Inc.*, 813 F.2d at 198 (applying *Christiansburg* in context of prevailing defendant). The Supreme Court has specifically stated that the standards for attorney's fees are the same for either the prevailing plaintiff or prevailing defendant. *Christiansburg*, 434 U.S. at 418. Furthermore, the court held that there is no rationale to support applying a different standard "when the EEOC is the losing plaintiff." *Id.* at 422. Granting attorney's "fees" is in conflict with the "American Rule," where each party is typically expected to bear the costs of their own litigation. Buckhannon Bd. & Care Home, Inc., v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 602 (2001). The "American Rule" yields to statutory authority providing for the recovery of attorney's fees. *Buckhannon*, 532 U.S. at 602. Specifically, the Civil Rights Act of 1964 provides for the award of attorney's fees to the prevailing party under certain circumstances. *Id.* at 602-03. The term "prevailing party" is defined as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded." BLACKS LAW DICTIONARY 1145 (7th ed. 1999). Keep in mind that "the Black's Law Dictionary [is not] preclusively definitive." *Buckhannon*, 532 U.S. at 616 (Scalia, J., dissenting).

[97] 42 U.S.C. § 2000e-5(k) ("In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee . . . as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.").

[98] Courts should venture to determine if awarding attorney's fees would result

F. Applicability of Res Judicata

Not surprisingly, the defense of res judicata[101] may not be available in a subsequent suit when the EEOC initially fails to meet a condition precedent.[102] In fact, res judicata

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in an unjust result on a case by case basis. Michael J. McNamara, Note, *Judicial Discretion and the 1976 Civil Rights Attorney's Fees Awards Act: What Special Circumstances Render an Award Unjust?*, 51 FORDHAM L. REV. 320, 321 (1982).

[99] *Christiansburg Garment Co.*, 434 U.S. at 422. Although *Hughes* did not involve the EEOC, it expressly stated that the standard for attorney's fees was subject to the same stringent review. Hughes v. Rowe, 449 U.S. 5, 14 (1980). In fact, the Court reiterated that "to take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." *Hughes*, 449 U.S. at 14-15 (internal quotations omitted).

[100] EEOC v. Kenneth Balk & Assoc., Inc., 813 F.2d 197, 198 (8th Cir. 1998) (applying "no-basis" standard to deny attorney's fees because there were grounds to believe employee was discriminated against); Obin v. Dist. No. 9 of Int'l Ass'n of Machinists, 651 F.2d 574, 587 (8th Cir. 1981) (reversing grant of attorney's fees because claimant did not act in bad faith in making religious discrimination claim).

[101] "[A] judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." Cromwell v. County of Sac, 94 U.S. 351, 352 (1876). For res judicata to apply, the judgment must be final, valid and on the merits; the parties must be identical; and the second suit must encompass matters decided in the first suit. 18 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 4402, at 8-11 (1981).

[102] Truvillion v. Kings Daughters Hosp., 614 F.2d 520, 524 (5th Cir. 1980). *Weissinger v. United States* also provides insight into the types of arguments that have successfully persuaded one circuit court judge to bar a subsequent suit. 423 F.2d 795 (5th Cir. 1970) (en banc). Judge Godbold of the Fifth Circuit wrote the majority opinion which contained public policy overtones favoring defendants. *Weissinger*, 423 F.2d at 796. Uniquely, Judge Godbold looked at the perspective of

does not typically attach to either the EEOC or a private plaintiff, and, hence, the EEOC has the option of simply starting over and properly completing each prerequisite if the timeliness requirements so permit.[103] Turning attention again to *Truvillion*, the court classified the investigation requirement as "jurisdictional" specifically for res judicata purposes and permitted the EEOC to issue a right-to-sue letter to the private party, allowing her to file her own lawsuit.[104] The Fifth Circuit's rationale centered on the premise that a dismissal for failure to meet a condition precedent is not an adjudication on the merits, therefore, res judicata did not bar the subsequent suit.[105] While Judge Wisdom's language in *Truvillion* seems to make clear that the res judicata defense will not succeed,

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the defendant and specifically noted that not barring a subsequent lawsuit actually worked as harassment on the defendant. *Id.* at 802. Furthermore, the opinion noted problems with ripeness when condition precedents had not been fulfilled. *Id.*

[103] *Truvillion*, 614 F.2d at 525. Since the EEOC could simply start over and complete the prerequisites in an appropriate manner, the judgment did not have a res judicata effect on the Commission and, therefore, it had no res judicata effect on the private plaintiff. *Id.* This rule of law "reflect[s] an optimal balancing of three interests: fairness to the plaintiff, fairness to the defendant, and judicial economy." John E. Eichhorst, *Res Judicata Effects Of Involuntary Dismissals: When Involuntary Dismissals Based Upon Prematurity Or Failure To Satisfy a Precondition To Suit Should Bar a Second Action*, 70 CORNELL L.REV. 667, 667 (1985).

[104] *Truvillion*, 614 F.2d at 524. Since the statutory requirements to the EEOC's first suit were jurisdictional, this serves as a condition to adjudicating the merits for res judicata purposes. *Id.* In *Nilsen v. City of Moss Point*, 674 F.2d 379 (5th Cir. 1982), the court explained that its reasoning for not barring the second claim using res judicata was that the EEOC "could give the necessary notice, undertake the required good faith investigation, and start over." *Nilsen*, 674 F.2d at 383 n.5. *But see* Lemar v. EEOC, 28 Fair Empl. Prac. Cas. (BNA) 1042 (N.D. Ill. 1981) (declining to allow plaintiff to use Title VII as basis for jurisdiction in suit against not only former employer, but also EEOC itself when Commission was not previously named as respondent).

[105] *Travillion*, 614 F.2d at 524. It is rudimentary that res judicata will bar an action if there has been a prior judgment on the merits in the same claim in a dispute between the same parties. *See* Martino v. McDonald's Sys., Inc., 598 F.2d 1079 (7th Cir. 1979) (explaining that parties must be same and judgment must be final and on merits). Furthermore, when a suit is dismissed for lack of subject matter jurisdiction, the subsequent action is not barred when brought in a court of competent jurisdiction. *Nilsen*, 674 F.2d at 382 (citing 5C WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (1969)).

the underlying ambiguity and hazy line distinguishing his own opinion in *Jones v. Ball Helicopter Co.*,[106] which barred a subsequent suit, makes the argument a tenuous yet potentially meritorious one.[107]

IV. PUBLIC POLICY IMPLICATIONS

In order for any defensive position to be persuasive, a practitioner should consider how the action fits into the overall policy served by Title VII. The following section explores several public policy concerns that accentuate the importance of adequate remedies for respondents faced with an unreasonable investigation or bad faith conciliation.

A. Judicial Economy

The judicial economy policy argument, which considers the impact a decision will have on the breadth and volume of federal cases, is used in a variety of contexts and it is particularly applicable to EEOC misconduct.[108] By allowing claims not investigated in good faith to proceed to trial, mildly unfavorable employment decisions may become the subject of formal EEOC charges. Logically, less effective administrative "filters" could affect the workload of the EEOC by increasing the number of claims it receives. This may realistically equate to more frivolous suits reaching the courts.[109] The personal and emotional nature of employment relationships already makes this area of litigation especially susceptible to voluminous claims. Permitting the Commission to circumvent its requirements can only broaden the number and scope of issues litigated, which, in turn, increases the time and expense of discovery and trials.[110] Ultimately, when the EEOC only does enough to satisfy the "conciliation checkbox," the opportunity for mediation, arbitration or settlement and the quality of judicial decision-making is potentially diminished because more cases will require formal adjudication.[111]

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[106] 614 F.2d 1389 (5th Cir. 1980)

[107] It must also be considered that *Truvillion* was decided in close proximity to *Jones*, 614 F.2d at 1389. In *Jones*, the EEOC brought a discrimination action and the EEOC suit was dismissed, yet the private party later brought the same action on her own behalf. *Id.* at 1390. The appeals court affirmed the district court's dismissal on res judicata grounds because the EEOC did not meet the requirements of the Administrative Procedure Act. *Id.* Contrasting *Truvillion* with *Jones*, the Fifth Circuit reversed a district court's dismissal although the EEOC had not investigated in good faith and it was well-established that a fair investigation was a crucial requirement. *Truvillion*, 614 F.2d at 524-25. *Jones* hinged on Federal Rule 41(b) because the Fifth Circuit said that the dismissal was an adjudication on the merits and *Truvillion* was different because the dismissal was jurisdictional. Eichhorst, *supra* note 102, at 680. At least one scholar has explained that the differences may stem from the fact that the requirements under the Administrative Procedure Act are similar to a statute of limitations or laches, and these considerations are traditionally more substantive than procedural. *Id.*

[108] Pearce v. Barry Sable Diamonds, 912 F. Supp. 149, 152 (E.D. Pa. 1996) (quoting Moteles v. Univ. of Pa., 730 F.2d 913, 917 (3d Cir. 1984) (stating that "the sorting out of the complexities surrounding employment discrimination can give rise to enormous expenditure of judicial resources in already heavily overburdened Federal district courts"); *see also* Taylor v. Va. Union Univ., 139 F.3d 219, 239 (4th Cir. 1999) (discussing limitation on charges pursuable by EEOC in interests of judicial economy); Baughey v. Tecumseh Country Club, Inc., 1 F.3d 1240 (6th Cir. 1993) (refusing to dismiss case with defective filing because judicial

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economy was served by maintaining jurisdiction and adjudicating case); EEOC v. Wackenhut Corp., 939 F.2d 241, 243 (5th Cir. 1991) (hearing employment matter consolidated by magistrate judge considering judicial economy and Title VII).

[109] *See* Robert E. Talbot, *A Practical Guide To Representing Parties In EEOC Mediations*, 37 U.S.F. L. REV. 627, 627 (2003) (expanding on policy concerns stemming from "explosion" in number of Title VII claims brought annually). In fact, it is well documented that private employment lawsuits have increased by 300 percent in the 1990's alone. *Id.* (citing *Job-Bias Suits in 1990 Rose More Than Threefold*, WALL ST. J., Jan. 17, 2000, at B13 for statistical information). The judicial economy policy argument should not be overlooked as many commentators have expressed concern that every possible employer is open to lawsuit as a result of the vast protection given to employees. *Id.* This has resulted in the alarming reality that "minor decisions [are] a potential legal landmine." *Id.*

[110] When the EEOC is allowed to investigate in bad faith, more reasonable cause determinations may be made on more charges since it is not uncommon for an aggrieved employee to seek relief under several Title VII causes of action. Moreover, when the conciliation process is not undertaken properly, more cases will proceed to trial in a form that reflects the scope of the plaintiff's unchanged charge. As with any complaint, it is standard practice to allege all potential claims to preserve them.

[111] Chemerinsky, *supra* note 52, at 117 (explaining that undeveloped cases usually contain inadequate trial record, which hampers quality of judicial decision-making).

B. *Abuse of Process*

When the EEOC conducts an investigation in bad faith or seeks to use the court's process to enforce a subpoena or other order, the court should rule against the Commission because "a court may not permit its process to be abused."[112] When a court's process is abused, employers are subjected to liability under Title VII, which can be economically and stigmatically severe.[113] Moreover, the Commission's proper completion of its statutory prerequisites directly prevents abuse of process because each charge's merits have been scrutinized before a court's involvement is invoked. The worst type of abuse would seem to occur if an employer is brought into costly litigation solely for the purposes of harassment. In essence, Commission misconduct also hinders traditional due process protections and, therefore, it is not unreasonable to conclude that EEOC bad faith may be unconstitutional on several levels.[114] At any rate, strict adherence to abuse of process precedent by the courts can have a significantly positive impact on employment discrimination litigation.

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[112] EEOC v. Michael Constr. Co., 706 F.2d 244, 250 (8th Cir. 1983) (citing United States v. Powell, 379 U.S. 48, 58 (1964)). In *Michael Constr. Co.*, the Eighth Circuit considered the appeal by the EEOC that the district court erred in refusing to enforce a Commission subpoena and award of attorney's fees. 706 F.2d at 247. Specifically, the district court held that the EEOC performed the investigation in bad faith because the agency's specialist stated that she did not think the claim was valid. *Id.* The appeals court specifically approved of the rule requiring district courts not to enforce EEOC subpoenas when the Commission has proceeded in bad faith during the investigation." *Id.* at 250. The court also analogized the EEOC procedures to the Internal Revenue Service and stated that the Supreme Court evaluates four elements to prove the good faith of the IRS in enforcement proceedings: "(1) that the agency is conducting its investigation pursuant to a legitimate purpose, (2) that the administrative inquiry is relevant to that purpose, (3) that the agency does not already possess the information sought, and (4) that the agency has followed proper procedural steps in conducting its investigation. *Id.* (citing *Powell*, 379 U.S. at 57-58). Once the IRS shows that it acted in good faith, the "heavy burden" shifts to the defendant to prove bad faith. *Id.* (citing United States v. LaSalle Nat. Bank, 437 U.S. 298, 316-17 (1978)). Applying the analogous law, the court reversed the district court's finding of bad faith and did not find an abuse of the court's process since the Commission proceeded in "partial" good faith. *Michael Constr. Co.*, 706 F.2d at 252.

[113] *See* 42 U.S.C. § 1981a. (providing for limited punitive damages in disparate treatment claims where liability arises for intentional discrimination under Title VII). In fact, compensatory and punitive damages are available "in addition to any relief authorized" by § 706(g) of Title VII. *Id.*

[114] *See* EEOC v. Univ. of Pennsylvania, 850 F.2d 969, 980 (3d Cir. 1988) (en-

C. Protecting Business

It is generally accepted that American society has an inherent interest in gainful employment and prudent workplace practices.[115] In addition, the unemployment rate is one of the driving factors of the nation's economy and, as such, it is in society's best interest to prevent employers from bearing avoidable litigation costs.[116] Many employers are inclined to conciliate and settle as it is often more efficient than ultimately winning a case on the merits. The current statutory scheme places an employer in the predicament of attempting to amiably negotiate with an agency whose principles are sometimes best served by making an example of an employer.[117] Logically, expending resources defending invalid law-

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couraging defendant to assert both constitutional and abuse of process defenses to Title VII charge). *But see* EEOC v. St. Regis Paper Co.-Kraft. Div., 717 F.2d 1302, 1304 (1st Cir. 1983) (holding that "exceptional circumstances" are required to find abuse of court's process in EEOC action); EEOC v. U.S. Steel Corp., 534 F. Supp. 416, 418 (D.C. W.Va. 1982) (proposing that abuse of process should not be construed to render EEOC's investigatory powers useless).

[115] The Supreme Court has stated that one of the main goals of Title VII is to encourage employers in the private sector to use preemptive measures to prevent discrimination. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999). Consequently, this consideration complements an argument based on the interests in promoting employment because it seems fundamentally unfair to further inconvenience an employer who has made prophylactic efforts to eliminate unlawful practices at his or her establishment. Nevertheless, under the current scheme, employees are allowed to bring Title VII lawsuits regardless of the efforts already expended by employers to provide better working environments. Melli, Walker, Pease & Ruhly, *Employees Continue To File Thousands Of EEOC Charges*, 8 No. 5 WIS. EMP. L. LETTER 3 (May 1999). "Anyone who says that the business of EEO isn't a powder keg ready to blow at any minute is either a fool or hasn't dealt with it." DEAN B. PESKIN, THE BUILDING BLOCKS OF EEO 211 (World Publ'g Co. 1971).

[116] Although this specific argument has not been formally articulated in a reported opinion, or otherwise, it is roughly based on Judge Posner's well-known theories on efficient administration of the law. *See generally* R. POSNER, ECONOMIC ANALYSIS OF LAW 13, 29 (5th ed. 1998). Courts should consider the policy ramifications of fostering EEOC misconduct with respect to the impact their decisions will have on the business practices.

[117] *See* Robert A. Kearney, *Who's "In Charge" at the EEOC?*, 50 DRAKE L. REV.

suits may have the effect of hiring reductions, downsizing and even possibly forcing small companies out of operation.[118] Furthermore, the negative stigma of discrimination claims can foreseeably injure a company's reputation, recruiting and ability to conduct normal day-to-day business.

D. Legislative Intent

Title VII is a remedial statute created to "further promote equal employment opportunities for American workers," and, as such, it is construed in favor of the complainant.[119] Congress recognized that the judicial system is not always the most efficient or best medium for resolving employment disputes;[120] therefore, the Commission should only take a matter to trial if conciliation "proves to be impossible."[121] Im-

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1, 31 (2001). ("[t]he current system does not work. It effectively allows charging parties to determine which charges will be investigated and which will be litigated. . . . [The] respondents' rights—and the one-sidedness of this process—are ignored, and those employers who would rather conciliate are forced to litigate. A system that requires a defendant to litigate even though it is willing to settle is nonsense.").

[118] Pennsylvania Civil Justice Coalition, *The Costs of Lawsuit Abuse, available at http://www.pacjc.org/cost.html#Anchor-11802* (2003) ("The time and cost of simply defending a frivolous lawsuit can put a small business out of business. . . . Lawsuit abuse can have a disastrous effect on the cost of doing business and the ability to create jobs.").

[119] S.Rep. No. 681 and H.R.Rep. No. 899, 92d Cong., 2d Sess. 17 (1972); 2 LEG.HIS. 1837; *see also* Ang v. Proctor & Gamble Co., 932 F.2d 540, 546 (6th Cir. 1991) (explaining that narrow construction of requirement is common when it prevents plaintiff from pursuing claim); Danner v. Phillips Petroleum Co., 447 F.2d 159, 162 (5th Cir. 1971) (deciding that protecting private parties, who are usually "unschooled" laypeople is important overriding interest in Title VII); Kelly Koening Levi, *Post Charge Title VII Claims: A Proposal Allowing Courts To Take 'Charge' When Evaluating Whether To Proceed Or To Require a Second Filing*, 18 GA. ST. U. L. REV. 749, 753 (2002) (stating that since statute is remedial, administrative processes generously lean towards allegedly aggrieved employee). In fact, several courts have explicitly recognized that Title VII is relaxed in order to serve Congress's goal of protecting employers.

[120] Dinkins v. Charoeu Pokphand U.S.A., Inc., 133 F. Supp. 2d 1237, 1241 (N.D. Ala. 2001).

[121] 118 CONG. REC. H.R. 1746, 92nd Cong. (1972) (statement of Rep. Perkins). The remarks of Congressman Perkins introduced in the Conference Report on House Resolution 1746 make clear that there are no exceptions to good faith conciliation. *Id.* "The conferees contemplate that the Commission will continue to make every effort to conciliate as it is required by existing law. Only if concilia-

plicit in Congress's intent is that conciliation is to be approached seriously and, under no circumstances, should be completed in bad faith. As to investigation, Congress intended to grant the EEOC a limited investigatory ability, and they were specifically given less investigative authority than other federal entities such as the Federal Trade Commission or the Wage and Hour Administrator.[122] This limitation runs contrary to autonomy consistently given to Commission officers. Congress gave substantial weight to the premise that the EEOC would have to investigate and seek voluntary compliance before developing a lawsuit.[123] Therefore, although the legislative intent is not profoundly insightful, it fully supports judicial scrutiny of EEOC actions.

V. CONCLUSION

The EEOC has to fulfill several requirements in order to establish a facially valid claim, and among the most important requirements to just resolution of Title VII claims are the duties of investigation and conciliation. In theory, an employer who believes the Commission has investigated in bad faith does not have to idly permit misconduct by overzealous Com-

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tion proves to be impossible do we expect the Commission to bring action in federal district court to seek enforcement." *Id. See* EEOC v. Sherwood Med. Indus., 452 F. Supp. 678, 683 (M.D. Fla. 1978) ("The legislative history of the 1972 amendments confirms that Congress viewed judicial relief as a recourse of last resort, sought only after a settlement has been attempted and failed. Conciliation is clearly the heart of the Title VII administrative process.").

[122] 110 CONG. REC. 7214 (1964). Senators Clark and Case explained: "It is important to note that the Commission's power to conduct an investigation can be exercised only after a specific charge has been filed in writing. In this respect the Commission's investigatory power is significantly narrower than that of the Federal Trade Commission . . . or of the Wage and Hour Administrator, . . . who are authorized to conduct investigations, inspect records, and issue subpoenas, whether or not there has been any complaint of wrongdoing." *Id; see also* Graniteville Co. v. EEOC, 316 F.Supp. 1177 (D.C. S.C. 1969), *order rev'd*, 438 F.2d 32, (4th Cir. 1971) (discussing Title VII's legislative history and stating that EEOC's power of investigation was "carefully circumscribed").

[123] 118 CONG. REC. S221 (1972). *See Sherwood Med.*, 452 F. Supp. at 678 ("This contention . . . [allowing the EEOC to commence suit without conciliation], would run contrary to the Congressional intent and could well have the affect of rendering the conciliation requirement an empty formality.").

mission officers. In reality, many smaller employers do not have the resources to pay lawyers to fight with the EEOC and, even if they do, their remedies are limited and require carrying an uncompromising burden of proof. In fact, the limited protection essentially makes EEOC misconduct another cost of doing business. By taking a plaintiff-oriented stance, courts have made it clear that the interests in protecting employees outweigh the interests in employer welfare. More importantly, and more offensively, when a Title VII charge is filed the scales of justice are already tilted in favor of the Commission and the plaintiff who has yet to prove that the employer has engaged in any culpable conduct. Until the brunt of the process is distributed fairly onto the Commission, the allegedly aggrieved and the employer, the public will bear the cost of lawsuits that would not reach a jury but for EEOC misconduct.

Anthony P. Zana[*]

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[*] Dedicated to Donald D. Zana and Donald D. Zana, II.

RECENT DECISIONS

Constitutional Law—Hate Speech—First Amendment Permits Ban on Cross Burning When Done with the Intent to Intimidate

I. FACTS

Cross burning has a vicious history of use by the Ku Klux Klan as a tool of intimidation throughout the South, including Virginia.[1] Although often used as a threat of impending violence, the burning cross is sometimes used by the Klan as a potent symbol of the group's shared political ideology.[2] In an effort to protect its citizens from this powerful form of intimidation, the Virginia legislature prohibited the burning of a cross with the intent to intimidate in section 18.2-423.[3] Virginia's cross-burning statute also contained a provision stating that the act of burning the cross itself is prima facie evidence of the requisite intent to intimidate.[4]

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[1] Virginia v. Black, 123 S. Ct. 1536, 1545 (2003). The Klan used cross burning as a violent threat against people whom its members felt were fundamentally opposed to the organization's goals. *Black*, 123 S. Ct. at 1545. The Klan burned crosses in front of churches, synagogues, proposed housing projects, the homes of African-Americans who moved into predominantly white neighborhoods, on the lawns of those associated with civil rights activity and others. *Id.* at 1545-46. The threat of violence to those at which the burning cross is directed is especially significant given the notorious history of Klan violence. *Id.* It is well documented that the Klan's use of violence included lynching, whippings, bombings, beatings, stabbings and mutilations. *Id.* at 1544-45. By September 1921, one newspaper had recorded 152 acts of Klan violence, including 41 floggings, 27 tar and featherings and 4 murders. *Id.* at 1545. The Klan's reign of terror in the South continued after this, and intensified during the Civil Rights Movement of the 1950s and 1960s. *Black*, 123 S. Ct. at 1545.

[2] *Black*, 123 S. Ct. at 1546. At Klan gatherings the burning cross is often used in a ceremonial context, indicating the climax of the rally or initiation. *Id.* For Klansmen, a cross may also be burned as a sign of celebration, such as the wedding of two members. *Id.* Other non-threatening uses of the burning cross by the Klan include the protest of proposed new laws and recruiting efforts. *Id.*

Respondents Barry Black, Richard Elliot and Jonathan O'Mara were each separately convicted of violating Virginia's statute prohibiting cross burning.[5] At Black's trial, the jury was instructed as to the meaning of "intent to intimidate" and that the required intent may be inferred from the act of burning a cross by itself.[6] Each respondent appealed to the Supreme Court of Virginia, and their cases were consolidated.[7] The Supreme Court of Virginia held that the statute was unconstitutional on its face because it impermissibly discriminated on the basis of content, and the prima facie evidence provision rendered the statute overbroad.[8] Three justices dissented, disagreeing with the court's two essential holdings.[9] The United States Supreme Court granted certiorari and held: affirmed in part, vacated in part and remanded.[10] A state may, consistent with the First Amendment, regulate cross burning done with the intent to intimidate; however, a prima facie evidence provision, such as the one in Virginia's statute, will render the statute unconstitutional.

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[3] *Id.* at 1541-42. Virginia's cross-burning statute, § 18.2-423, makes it unlawful for any person to burn, or cause to be burned, a cross on the property of another, a highway or other public place, when done with the intent to intimidate. *Id.* at 1541.

[4] *Id.* at 1542. Virginia added the prima facie provision to section 18.2-423 in 1968. *Id.* at 1550. The Supreme Court of Virginia has yet to interpret the exact meaning of the prima facie provision. *Id.* It has stated that simply burning a cross, without the requisite intent to intimidate, is enough to arrest and prosecute and will protect the Commonwealth from a motion to strike the evidence following the presentation of its case-in-chief. *Id.*

[5] *Id.* at 1541. In Carroll County, Virginia, on August 22, 1998, Barry Black led a Klan rally. *Id.* at 1542. It was attended by twenty-five to thirty Klansmen including the owner of the private property on which the rally occurred. *Id.* The gathering culminated in the burning of a twenty-five to thirty foot cross, for which Black was subsequently arrested. *Id.* The arresting officer observed the burning cross from Brushy Fork Road, approximately 300-350 yards away from the field on which the gathering took place. *Black*, 123 S. Ct. at 1542. On May 2, 1998, Richard Elliot and Jonathan O'Mara attempted to burn a cross in the yard of James Jubilee, Elliot's African-American neighbor. *Id.* at 1542-43. Neither Elliot or O'Mara are members of the Klan and their motive was to "get back" at Jubilee for inquiring to Elliot's mother about gunfire he had heard in their backyard. *Id.* at 1543.

[6] *Id.* at 1542. Black objected to the jury instruction regarding inferred intent, on First Amendment grounds, and the prosecutor replied that it was taken straight from the Virginia Model Jury Instructions. *Id.* The jury found Black guilty, and the Court of Appeals of Virginia later affirmed his conviction. *Id.* Elliot and O'Mara were charged with conspiracy to commit cross burning and attempted cross burning. *Id.* at 1543. O'Mara pleaded guilty to both charges but reserved the right to challenge the constitutionality of the cross-burning statute. *Black*, 123 S. Ct. at 1543. At Elliot's trial, the jury did not receive any instruction on the prima facie evidence provision of the Virginia statute or on the meaning of the word "intimidate." *Id.* The jury acquitted him of the conspiracy charge and found him guilty of attempted cross burning. *Id.* The convictions of both Elliot and O'Mara were later affirmed by the Court of Appeals of Virginia.

II. RELATED LAW

The First Amendment of the United States Constitution, made applicable to the states through the due process clause of the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech."[11] The fun-

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Id.

[7] *Black*, 123 S. Ct. at 1543. The respondents argued that the Virginia statute is facially unconstitutional. *Id.*

[8] *Id.* The court held that the statute discriminated on the basis of content because it selectively chose to prohibit cross burning due to its disfavored message. *Id.* In holding that the prima facie evidence provision rendered the statute overbroad, the court found that the increased likelihood of prosecution inhibits the expression of protected speech. *Id.*

[9] *Id.* The dissenting justices felt that the statute did not discriminate on the basis of content because it did not prohibit the burning of a cross with the intent to intimidate done with any specific underlying basis such as race or religion. *Id.* Instead, the statute applied to anyone who burned a cross with the intent to intimidate. *Id.* The dissenters also felt that the prima facie provision of the statute did not render it overbroad. *Id.* at 1543-44. They felt that the statutorily created inference did not prove the intent to intimidate beyond a reasonable doubt and the burden of proving this still remained with the Commonwealth. *Black*, 123 S. Ct. at 1544.

[10] *Id.* at 1552. The Supreme Court of Virginia's decision regarding Barry Black, that his conviction could stand, was affirmed. *Id.* The Supreme Court of Virginia's decision regarding Elliot and O'Mara was vacated and remanded for further proceedings. *Id.*

[11] U.S. CONST. amend. I. The Supreme Court held that the Due Process Clause of the Fourteenth Amendment makes the First Amendment applicable to the states. Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943) (reversing convic-

damental principle underlying the protection of free speech is that the government generally cannot proscribe speech because its message is offensive or unpopular,[12]and this includes expressive conduct.[13] Content based regulation of speech is presumptively inconsistent with the First Amendment.[14]

A. Recognition of Constitutionally Unprotected Categories of Speech

In *Chaplinsky v. New Hampshire*,[15] the Supreme Court considered the constitutionality of a state statute that prohibited calling another person by an offensive or derisive name in a public place.[16] The case involved a Jehovah's Witness named Chaplinsky who made several statements denouncing organized religion while distributing religious literature on a public street.[17] As Chaplinsky was being escorted to the po-

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tion of Jehovah's Witnesses arrested for violating a city ordinance prohibiting door to door sales without a license); *see also* U.S. CONST. amend. XIV (providing, in part, that no state shall "deprive any person of life, liberty, or property, without due process of law").

[12] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In his dissent, Justice Holmes argues that the theory of our Constitution is a free marketplace of ideas, including those ideas that we loathe. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). Justice Holmes was responding to the Majority's affirmation of the conviction of five Russian men who printed anti-American publications in violation of the Espionage Act. *Id.* at 630.

[13] Texas v. Johnson, 491 U.S. 397 (1989). The Supreme Court held that burning a flag at a political rally qualified as constitutionally protected speech because the act was "sufficiently imbued with elements of communication." *Johnson*, 491 U.S. at 404. The Court also held that the state of Texas' prohibition of flag burning was based on disapproval of its message and not an effort to preserve the peace. *Id.* at 419. The Supreme Court's decision in *Johnson* has been characterized as reaffirming, among other things, the principle that "Symbolic Expression is Fully Embraced by the First Amendment." Akhil Reed Amar, Comment, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 133 (1992).

[14] *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991) (invalidating New York's "Son of Sam" statute requiring that accused or convicted criminal's income from work describing his crime be deposited in escrow account).

[15] 315 U.S. 568 (1942).

[16] *Chaplinsky*, 315 U.S. at 569.

[17] *Id.* at 569-70. Several local citizens complained to the City Marshall, and

lice station for protection from the crowd, he called the City Marshal several degrading names and denounced all city government officials as fascists.[18] The United States Supreme Court upheld the statute as constitutional, basing its holding on the state court's narrow interpretation of the offensive speech statute.[19] The Court recognized that the government may regulate certain categories of speech that have too little social value to merit First Amendment protection,[20] including obscenity and defamation.[21] The Court reasoned that fighting words, as defined by this statute, constitute another category of speech that is not protected by the First Amendment.[22]

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the crowd became restless. *Id.* at 570.

[18] *Id.* at 569-70. Chaplinsky allegedly told the City Marshall, "'You are a God damned racketeer' and a 'damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.'" *Id.* at 569.

[19] *Id.* at 573-74. The New Hampshire court stated that the statute only forbade those words having a direct tendency to cause a violent reaction by the person to whom the speech was addressed. *Id.* at 573. This created an objective standard by which the Court considered what language would likely cause an average person to fight or react violently. *Id.* In affirming Chaplinsky's conviction, the Court stated that the offensive names used by him clearly fell within this category. *Id.* at 574.

[20] *Id.* at 571-72. The Court stated "the right of free speech is not absolute at all times and under all circumstances." *Id.* at 571. The government may prohibit or punish such speech because they comprise no essential part of any exposition of ideas and are of such minute social value that any benefit that may be derived from them is clearly outweighed by the governmental interest in order. *Id.* at 571-72; *see* Ronald Turner, *Hate Speech and the First Amendment: The Supreme Court's* R.A.V. *Decision*, 61 TENN. L. REV. 197, 205 (1993) (characterizing *Chaplinsky* decision as one of extreme categorization, indicating that some types of expression are wholly outside protection of First Amendment).

[21] *See* Roth v. United States, 354 U.S. 476, 485 (1957) (holding that obscenity is not constitutionally protected speech or press), *overruled on other grounds by* Planned Parenthood of Southeaster Pa. v. Casey, 947 F.2d 682 (3rd Cir. 1991); Beauharnais v. Illinois, 343 U.S. 250, 266-67 (1952) (upholding conviction of defendant for violation of Illinois defamation law because libelous speech is not protected by First Amendment).

[22] *Chaplinsky,* 315 U.S. at 572. The Court held that there is no constitutional right to express words causing personal injury or that would threaten an immediate violent response. *Id.*; *see* Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940) ("Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.")

B. Regulation of "True Threats"

In *Watts v. United States*,[23] the Supreme Court considered whether a 1917 federal statute prohibiting threats on the life of the President of the United States was constitutional.[24] Watts was participating in a small political discussion during a public rally on the Washington Monument grounds.[25] He stated that he was not going to attend his scheduled military physical, and if the military made him carry a gun the first person he wanted in his sights was L.B.J.[26] The Court held that the federal statute was constitutional given the government's special interest in protecting the safety of the president.[27] However, the Court recognized the importance of distinguishing "true threats" from constitutionally protected speech and noted that only the former could be prohibited.[28] Accordingly,the Court held that Watts' statements did not constitute a "true threat."[29]

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[23] 394 U.S. 705 (1969) (per curiam).

[24] *Watts*, 394 U.S. at 705. The statute in question prohibited any person from knowingly and willfully threatening to take the life of or to inflict any physical harm upon the President of the United States. *Id.*

[25] *Id.* at 706. The rally took place on August 27, 1966, and the group was scheduled to discuss police brutality. *Id.*

[26] *Id.* Watts said,

> They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want in my sights is L.B.J.

Id. On the basis of this statement, petitioner was convicted by a jury trial in the United States District Court for the District of Columbia. *Id.* The United States Court of Appeals for the District of Columbia affirmed his conviction. *Id.*

[27] *Id.* at 707. The nation has an overwhelming interest in protecting the safety of the President and in "allowing him to perform his duties without interference from threats of physical violence." *Id.*

[28] *Id.* at 708. The Court stopped short of defining exactly what constitutes a "true threat." *Id.* The statute must be interpreted in a way that avoids conflict with the freedom of speech, recognizing our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen." *Id. See generally* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (holding that constitutional public debate often includes vehement, caustic and sometimes unpleasantly sharp attacks directed at public officials.)

[29] *Watts*, 394 U.S. at 708. The Court examined Watts' statement in the context that it was made, which was at a public rally where the crowd reacted with

C. Limitations on Advocacy Regulations

In *Brandenburg v. Ohio*,[30] the Supreme Court reviewed the conviction of a Ku Klux Klan leader under an Ohio criminal syndicalism statute.[31] Brandenburg invited a Cincinnati television reporter to attend and film a Klan rally, where Brandenburg made several speeches to fellow Klansmen.[32] Although most of Brandenburg's speeches were inaudible, he clearly made several derogatory remarks toward African-Americans and Jews, as well as a statement indicating that the Klan may have to take "revengeance" action toward the government.[33] The Court determined that the Ohio statute was unconstitutional, holding that a state may only prohibit "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[34]

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laughter. *Id.* at 707-708. The Court determined that his expression was not a threat, just "a kind of very crude offensive method of stating a political opposition to the President." *Id.*; *see* William B. Fisch, *Hate Speech in the Constitutional Law of the United States*, 50 AM. J. COMP. L. 463, 483 (2002) (describing Watts' statements, taken in context, as nothing more than constitutionally protected "political hyperbole").

[30] 395 U.S. 444 (1969) (per curiam).

[31] *Brandenburg*, 395 U.S. at 444. The Ohio statute prohibited, in part, advocating the propriety or necessity of violence, crime or unlawful types of terrorism as a means of producing policitical or industrial reform. *Id.* at 444-45.

[32] *Id.* at 445. The rally was to be held on a farm in Hamilton County, Ohio. *Id.* The gathering was attended and filmed by the reporter and a cameraman, with the assistance of its organizers. *Id.* Parts of the film were subsequently broadcast on the local station as well as a national network. *Id.*

[33] *Id.* The footage showed twelve hooded figures congregated around a large wooden cross, which they burned. *Id.* Although Brandenburg himself was unarmed, several of the people in the film carried firearms. *Id.* In his speech, Brandenburg boasted that the Klan had the largest membership of any organization in the state and stated, "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." *Id.* at 446.

[34] *Id.* at 447. Prior to *Brandenburg*, the Court had held that simply advocating or teaching violent methods of effectuating political or economic reform constitutes such a threat to the state that it may proscribe it. Whitney v. California, 274 U.S. 357, 372 (1927), *overruled by Brandenburg*, 395 U.S. at 444. In his concurrence, Justice Brandeis urged the courts to adopt a more exacting standard; in

The Court overruled *Whitney,* which had failed to recognize the necessity in differentiating between simply teaching the moral propriety or necessity of the use of violent force and the act of preparing and fortifying the courage of a group to take such violent action.[35] According to the Court, the Ohio statute fails to draw this distinction, and, therefore, was invalid because it swept under its control speech that is constitutionally protected.[36]

D. Removal of Offensive Speech from Fighting Words

In *Cohen v. California,*[37] the Supreme Court considered whether a state could constitutionally proscribe the simple

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order for speech to be constitutionally proscribable there must be reasonable ground to fear that it will result in serious evil and that the danger is imminent. *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring). Prior to *Brandenburg* there was a judicial movement toward Brandeis' more restrictive standard of proscribable speech. *See* Dennis v. United States, 341 U.S, 494, 507 (1951) (upholding the constitutionality of statute prohibiting communist conspiracy).

[35] *Brandenburg*, 395 U.S. at 448 (overruling *Whitney*, 274 U.S. at 357). *See generally* Bond v. Floyd, 385 U.S. 116, 134 (1966) (holding that simply making statements sympathizing with and supporting men who refuse to respond to military draft does not constitute unlawful refusal to be drafted); Noto v. United States, 367 U.S. 290, 297 (1961) (holding that hostile, offhand remarks alone cannot be construed as advocating violent overthrow of government); Herndon v. Lowry, 301 U.S. 242, 259 (1937) (holding that addressing and organizing Communist Party meetings is not attempted incitement to insurrection by violence).

[36] *Brandenburg*, 395 U.S. at 448. *See generally* United States v. Robel, 389 U.S. 259, 288-89 (1967) (holding unconstitutional section of Subversive Activities Control Act because it seeks to bar some employment by member of Communist Party which may not be proscribed consistently with First Amendment); De Jonge v. Oregon, 299 U.S. 353, 365 (1937) (reversing conviction of Communist Party members for violation of Oregon syndicalism statute because, irrespective of party objectives, they have constitutional right to peacable assembly with lawful purpose). The right to peaceful opposition of the government is guaranteed to our people. Stromberg v. California, 283 U.S. 359, 366-70 (1931). The holding in *Brandenburg* has been characterized as significantly improving the protection of the freedom of speech. David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the* Brandenburg *Test*, 29 GA. L. REV. 1, 13 (1994). No longer can people who are unhappy with the government be convicted simply because their rhetoric assailed the status quo. *Id.* No longer can the lonely socialist be jailed because his ideas pose a danger in the remote future. *Id.* Now, "[a] speaker can be held responsible for his own utterances, but not for the countless possibilities that violence may ensue when the words are interpreted by unknown persons at an indefinite time in the future." *Id.*

[37] 403 U.S. 15 (1971).

public display of a single four-letter expletive.[38] Cohen walked into the Los Angeles County Courthouse wearing a jacket that said "Fuck the Draft" and was arrested shortly thereafter.[39] Cohen was convicted in the Los Angeles Municipal Court for violation of a California statute that prohibited disturbing the peace by offensive conduct.[40] First, the Court held that the speech at issue did not fall within the few categories of speech that prior precedent has established as constitutionally proscribable.[41] The Court overturned Cohen's conviction and held that without more particularized and compelling reasons, the state could not constitutionally proscribe the simple public display of a single four-letter expletive.[42] Although several previous cases held that offensive, disturbing speech deserves protection,[43] in *Brandenburg* the Court expanded its constitutional tolerance of such expression.[44] The holdings in *Watts*, *Brandenburg* and *Cohen* underscore the Court's reluctance to allow governmental restrictions on speech unless the government can demonstrate the presence of a legitimate threat of imminent violence.[45]

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[38] *Cohen*, 403 U.S. at 16. The Court considered the issue on the theory that this was likely to cause a violent reaction, and that the State should act as guardians of public morality. *Cohen*, 403 U.S. at 22-23.

[39] *Id.* at 16-17. The incident occurred on April 26, 1968, with women and children present in the courthouse. *Id.* at 16. Cohen stated that he wore the jacket to inform the public how strongly he opposed the Vietnam War and the draft. *Id.* Neither Cohen, nor anyone else in attendance, committed or threatened to commit any act of violence. *Id.* He did not make any loud or bizarre noises. *Id.* at 17.

[40] *Id.* at 16. Cohen was sentenced to thirty days in jail. *Id.*; *see* William S. Cohen, *A Look Back at* Cohen v. California, 34 UCLA L. REV. 1595, 1596 (1987) (describing sentence Cohen received as "incredibly harsh"). In affirming his conviction, the Court of Appeals defined "offensive conduct" as behavior tending to provoke others to violent acts and, in turn, disturb the peace. *Cohen*, 403 U.S. at 17. The Court held that it was reasonably foreseeable Cohen's conduct might cause others to react with violence toward him or attempt to physically remove his jacket. *Id.*

[41] *Cohen*, 403 U.S. at 19-20. In *Chaplinsky*, the Court held that the government may regulate obscene speech and speech that constitutes "fighting words." *Chaplinsky*, 315 U.S. at 571-72. Here, the Court held that in order for obscene speech to be prohibited it must be "in some significant way, erotic." *Cohen*, 403 U.S. at 20. The Court also held that Cohen's speech did not constitute fighting words because it was not a direct personal insult to any individual, and, in fact, no one present at the courthouse reacted violently. *Id.* at 20. This holding significantly reduced governmental power to restrict speech as "fighting words." Thomas S. McGuire, Comment, *First Amendment—Free Speech—First Amendment Prohibits Hate Crime Laws That Punish Only Fighting Words Based on Racial, Religious or Gender Animus*—R.A.V. v. City of St. Paul, *112 S. Ct. 2538*, 23 SETON HALL L. REV. 1067, 1080 (1993) (describing *Cohen* decision as narrowing fighting words doctrine by holding that offensive speech alone is not fighting words).

[42] *Cohen*, 403 U.S. at 26. The Court had recently recognized that speech may be prohibited to prevent intrusion into the privacy of the home of unwelcome

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ideas, but "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech." Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 738 (1970) (holding that asserted right of mailer stops at outer boundary of one's home). The majority rejected the state's contention that government could prohibit offensive speech simply because it was cast upon unwilling listeners. *Cohen*, 431 U.S. at 21; *see* Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (holding unconstitutional injuction preventing pamphleteer from passing out unpopular literature to public). The majority described the reasoning of the California court as reflecting an unfounded fear of disturbance, which is not enough to defeat the right of freedom of expression. *Cohen*, 431 U.S. at 23; *see* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) (holding that regulation prohibiting and punishing students from wearing armbands to school to protest Vietnam War is unconstitutional denial of student's right of expression). Additionally, the Court expressed reluctantance to suppress offensive expression because it often contains an imprecise emotional expression that deserves protection. *Cohen*, 431 U.S. at 26; *see* Baumgartner v. United States, 322 U.S. 665, 673-74 (1944) (recognizing right to criticize public officials foolishly and without moderation while reversing decision to set aside naturalization decree).

[43] *See* Street v. New York, 394 U.S. 576 (1969). The Court overturned a conviction for malicious misdemeanor of a man who burned a flag in protest and made a hostile statement about the flag. *Street*, 394 U.S. at 589-91. The Court recognized Street's statements as constitutional, re-emphasizing that the mere offensive nature of words does not strip them from protection. *Id.* at 592; *see* Terminello v. City of Chicago, 337 U.S. 1, 5 (1949) (holding speech that merely causes anger or outrage is constitutionally protected and may not be prohibited). The Court overturned a conviction for breach of the peace by a man who publicly insulted a group of adversaries because the applicable statute was overbroad. *Terminello*, 337, U.S. at 5.

[44] Melody L. Hurdle, R.A.V. v. City of St. Paul: *The Continuing Confusion of the Fighting Words Doctrine*, 47 VAND. L. REV. 1143, 1151-52 (1994) (discussing doctrinal development of Court regarding offensive speech).

[45] Michael S. Degan, Comment, *Adding the First Amendment to the Fire: Cross Burning and Hate Crime Laws*, 26 CREIGHTON L. REV. 1109, 1128-30 (1993) (analyzing history of treatment of threatening speech by Court).

E. Rejection of Content based Regulation Within Unprotected Categories

In *R.A.V. v. City of St. Paul*,[46] the Supreme Court considered the constitutionality of a St. Paul statute that prohibited displaying a symbol that one knows or has reason to know will arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.[47] The petitioner and several other teenagers were charged under the statute for allegedly burning a cross in the yard of a black family that lived across the street from the petitioner.[48] First, the Court rejected the premise that certain categories of speech, including obscenity, defamation and "fighting words", which previous decisions declared constitutionally proscribable, are completely unprotected by the First Amendment.[49] The Court stated that these categories of speech can be regulated because of their constitutionally proscribable content, but they are not completely invisible to the Constitution, "so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content."[50] However, the court recognized that this general rule contains exceptions permitting content based distinctions that are based entirely on the very reason the class of speech is proscribable,[51] are part of a law aimed only at conduct or secondary effects,[52] or present no possibility of official suppression of ideas.[53] After accepting the Minnesota Supreme Court's narrow interpretation that the statute only prohibits "fighting words,"[54] the Court held that it was facially unconstitutional.[55] Although Justice White

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[46] 505 U.S. 377 (1992).

[47] *R.A.V.*, 505 U.S. at 377. One who violates this statute is guilty of disorderly conduct, a misdemeanor. *Id.* at 380.

[48] *Id.* at 379. The incident occurred on June 21, 1990. *Id.* The cross that was burned was crudely assembled by taping together the broken legs of a chair. *Id.*

[49] *Id.* at 383-84. *See, e.g., Chaplinksy*, 315 U.S. at 571-72 (holding that obscenity, defamation and "fighting words" could be regulated by government). The majority firmly stated that these cases should not be interpreted to mean that "the First Amendment imposes no obstacle" to regulation of these types of speech, so that they may be regulated freely. *R.A.V.*, 505 U.S. at 384. The doctrinal shift in *R.A.V.* resulted from the majority's recognition that these categories can sometimes be expressive speech and deserving of some constitutional protection. *Id.* at 384-85. Thus, the majority "rejected the fundamental premise of *Chaplinsky* categorization by declaring that there are no unprotected categories of speech." Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court*, 80 IOWA L. REV. 51, 62-63 (1994).

[50] *R.A.V.*, 505 U.S. at 383-84. The majority recognized a general rule prohibiting content based distinctions used to selectively proscribe speech that is within a category otherwise unprotected. Note, *Federal Prosecution of Cross Burners*, 107 HARV. L. REV. 1729, 1731 (1994). To illustrate, the majority stated that the government may proscribe libel, but it may not make the further content-based discrimination of proscribing only libel that is critical of the government. *R.A.V.*, 505

U.S. at 383-84. The Court also recently recognized this distinction while upholding New York's child pornography law, in part, because it could not possibly be construed as censoring a particular literary theme. New York v. Ferber, 458 U.S. 747, 763 (1982). The notion that a particular type of speech may be proscribed on the basis of one aspect but not on the basis of another is common and has been applied by the Court in many contexts. *R.A.V.*, 505 U.S. at 385; *see* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 571 (1991) (holding that Indiana may prohibit nude dancing as prohibition of public nudity but not to prohibit its erotic message).

[51] *R.A.V.*, 505 U.S. at 388. "Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class." *Id.* To illustrate the majority noted that "[a] State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience*—i.e., that which involves the most lascivious displays of sexual activity." *Id.* The Court may not, however, proscribe only that obscenity which includes an offensive political message. *Id.* Additionally, the government may prohibit only those threats of violence directed against the President, because the reasons why violent threats are not protected (i.e., protecting citizens from fear of violence, from disruption caused by fear and possibility that such threatened violence will occur) have special force when attached to the President. *Id.*; *see* Watts v. United States, 394 U.S. 705, 707 (1969) (per curiam) (holding that government may prohibit threats on life of President). However, the government may not prohibit only those violent threats against the President that refer to one of his specific policies. *R.A.V.*, 505 U.S. at 388.

[52] *R.A.V.*, 505 U.S. at 389; *see* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (upholding zoning ordinance prohibiting adult movie theatres because it was aimed at secondary effects, including crime prevention, not at suppression of ideas); *see also* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71-73 (1976) (upholding zoning ordinance prohibiting adult movie theatres because it was aimed at preserving character of neighborhood and did not significantly suppress lawful speech).

[53] *R.A.V.*, 505 U.S. at 390. This type of regulation would raise no First Amendment issue. *Id.*

[54] *Id.* at 391. The Minnesota Supreme Court limited the phrase, "arouses anger, alarm or resentment in others," to reach only "fighting words." Id.

[55] *Id.* This statute is impermissibly content based because it applies only to "fighting words" that provoke violence or insult "on the basis of race, color, creed,

concurred in the result, he felt that the statute should have been declared unconstitutional on overbreadth grounds.[56] Similarly, Justice White observed that although the ordinance proscribed some unprotected speech, i.e. "fighting words," it also prohibited speech that results only in hurt feelings, offense or resentment, which are protected by the First Amendment.[57]

III. *VIRGINIA V. BLACK*

A. *Opinion of the Court*

In *Virginia v. Black*,[58] the United States Supreme Court held that Virginia could prohibit the burning of a cross done with the intent to intimidate because cross burning is a particularly virulent type of intimidation.[59] The Court began its

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religion or gender." *Id.* It does not prohibit using "fighting words" to express opposition to, for example, one's political affiliation, union membership or sexuality. *Id.* The First Amendment does not allow St. Paul to exact special prohibitions on speakers who express views on subjects it disfavors. *Id.* This type of selectivity indicates that St. Paul is attempting to prohibit the expression of particular ideas. *R.A.V.*, 505 U.S. at 394. This decision has been characterized as reaffirming the preeminence of free speech within our constitutional structure. Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135, 1147-51 (1994).

[56] *Id.* at 411 (White, J., concurring). The overbreadth doctrine voids a law that punishes protected and unprotected speech since the "possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (holding that Oklahoma statute prohibiting classified services employees from being associated with any political organization is not impermissibly vague or overbroad); *see also* Osborne v. Ohio, 495 U.S. 103, 112 (1990) (holding that prohibition against possessing child pornography is not constitutionally overbroad). *See generally* Note, *First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

[57] *R.A.V.*, 505 U.S. at 414 (White, J., concurring). The statute criminalizes speech that causes anger, alarm or resentment. *Id.* at 414. (White, J., concurring). However, the Court's "fighting word" cases have clearly held that such generalized reaction does not suffice to remove such expression from its constitutional protection. *Id.* See, e.g. Cohen v. California, 403 U.S. 15, 19-20 (1971).

[58] 123 S. Ct. 1536 (2003).

[59] *Black*, 123 S. Ct. at 1549. Justice O'Connor delivered the opinion of the Court, in which Rehnquist, C.J., Stevens, Scalia and Breyer, JJ., joined. *Id.* at 1541. "Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending vio-

analysis by concluding that although cross burning is often used as a violent threat it can also sometimes be used as constitutionally protected symbolic expression.[60]

The Court, citing precedent, stated that there are certain categories of speech, including "true threats" and "fighting words," that the government may regulate in a manner consistent with the Constitution.[61] The Court held that intimidation is constitutionally proscribable because it is a type of true threat "where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[62] Having determined that intimidation can be prohibited, the Court then considered whether Virginia could ban cross burning with the intent to intimidate as a subset of this broader category.[63] This type of content based discrimination had been prohibited by the general rule crafted in the *R.A.V.* decision; however, the Court noted that the rule contained exceptions including one allowing such content discrimination when it is based entirely on the "very reason the entire class of speech at issue is proscribable."[64] The

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lence." *Id.* at 1540. The Court reasoned that this decision is fully consistent with the Court's holding in *R.A.V. Id.* at 1550.

[60] *Id.* at 1545. The Court first analyzed the long, notorious history throughout the South, including Virginia. *Id.* at 1544-47. The Court recognized that the burning cross was often used by the Ku Klux Klan as a symbol of impending violence throughout the South, including the murders and beatings of blacks, Jews and others. *Id.* at 1544. The Court also recognized that the burning cross is also the most powerful symbol of the Klan's shared ideology and is used relatively peacefully at many Klan gatherings. *Id.* at 1546. The Court listed other non-threatening uses of the burning cross such as celebrations, inititiations and weddings as well as membership recruitment. *Black*, 123 S. Ct. at 1546. Only Justice Thomas disagreed that cross burning is sometimes constitutionally protected. *Id.* at 1563 (Thomas, J., dissenting).

[61] *Id.* at 1547. In *Chaplinsky* and *Cohen*, the Court held that fighting words were generally proscribable. *Id.* In *Brandenburg*, the Court held that a state could regulate advocacy of force directed to inciting imminent lawless action. *Id.* In *Watts*, the Court held that a state can ban a "true threat." *Id.*

[62] *Id.* at 1548. Justice O'Connor's opinion clearly defined what constitutes a "true threat." *Id.* "True threats" are statements which the speaker means to communicate a "serious expression of an intent to commit an act of unlawful violence" to another. *Id.*

[63] *Id.* at 1548-50. The Supreme Court of Virginia, relying on *R.A.V.*, concluded that this was an impermissible content based distinction. *Id.* at 1548.

[64] *Black*, 123 S. Ct. at 1548-49. In *R.A.V.*, the Court struck down a law pro-

Court concluded that the Virginia statute fell within this exception, holding that banning cross burning with the intent to intimidate does not violate the First Amendment[65] The Court further explained that although Virginia could have prohibited all intimidating speech, the First Amendment permits it to regulate only this subset of intimidating messages "because burning a cross is a particularly virulent form of intimidation."[66]

Next, the Supreme Court considered the constitutionality of the prima facie evidence provision of the Virginia statute, which stated that the act of burning the cross itself is prima facie evidence of the requisite intent to intimidate.[67] The Court held that the prima facie evidence provision, as interpreted by the jury instruction, made the statute unconstitutional because it removed the very reason cross burning may be banned, which is the intent to intimidate.[68] The Court

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hibiting cross burnings to communicate hostilities based on race, religion, color, creed or gender. *Id.* The Court reasoned that this content based discrimination was unconstitutional because it allowed the city to target only those who used fighting words in relation to specified, disfavored subjects. *Id.* The Court then discussed this specific exception, noting that once a reason has been deemed neutral enough to prohibit the entire class of speech, it is also neutral enough to "form the basis of distinction within the class." *Id.* at 1549. The Court then noted that this exception is allowed because there is no danger of idea or viewpoint discrimination in this situation. *Black*, 123 S. Ct. at 1549.

[65] *Id.* at 1549. The Court observed that the applicability of this exception eliminates the possibility of unconstitutional idea discrimination by the state. *Id.* The Court differentiated this law from the one it had considered in *R.A.V.* by observing that "[it] does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion," or because of the victim's political views, union membership or sexuality. *Id.*

[66] *Id.* Cross burning is considered a particularly virulent form of intimidation by the Court, in light of its long and notorious history as an indicator of impending violence. *Id.* "Thus, just as a state may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm." *Id.* at 1549-50.

[67] *Id.* at 1550 (plurality opinion). The Court noted that the jury in Black's trial was instructed that the provision means that they could infer the required intent from the act of burning the cross alone. *Id.* (plurality opinion).

[68] *Id.* at 1550 (plurality opinion). This portion of Justice O'Connor's opinion was joined by Rehnquist, C.J., Stevens and Breyer, JJ. The Court reasoned that the provision allows a jury to convict in every case that the defendant exercises his constitutional right to put on no defense. *Id.* (plurality opinion). Additionally,

stated that the absence of this requirement created an unacceptable chance that ideas are being suppressed.[69] Virginia may constitutionally prohibit cross burning with the intent to intimidate, but it may not bypass its burden of proving that the act was a "true threat" and not protected expression by adding a prima facie evidence provision to the statute.[70] The Court held that Black's conviction could not stand, and Elliot and O'Mara's convictions were vacated, and remanded for further proceedings.[71]

B. Justice Steven's Concurring Opinion

Justice Stevens concurred in the *Black* decision and noted that he did so based on the reasons stated in separate opinions by Justice White and himself in *R.A.V.*[72] Justice Stevens agreed that the Virginia statute was unconstitutional, but he reached his conclusion simply because it was overbroad.[73]

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the Court observed that it may also skew a jury toward finding an intent to intimidate in cases where the facts do not support such a conclusion. *Id.* (plurality opinion).

[69] *Black*, 123 S. Ct. at 1551 (plurality opinion). The Court stated that as construed by the jury instruction, "the provision chills constitutionally protected political speech because of the possibility that a State will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect." *Id.* (plurality opinion).

[70] *Id.* (plurality opinion). The Court stated that the prima facie evidence provision blurs the line between these two profoundly different meanings of a burning cross. *Id.* (plurality opinion). Whether a particular burning cross was intended to intimidate should be objectively determined from the facts of each case, but this provision, as the Court observed, unconstitutionally ignores all the relevant factors in making this decision. *Id.* (plurality opinion).

[71] *Id.* at 1552 (plurality opinion). The Court left open the possibility that, on remand, the Supreme Court of Virginia could interpret the provision so as to remove its constitutional defects. *Id.* (plurality opinion).

[72] *Id.* at 1552 (Stevens, J., concurring). In his concurrence in *R.A.V.*, Justice Stevens felt that the case should have been decided because it was overbroad and criminalized some protected speech. R.A.V. v. City of St. Paul, 505 U.S. 377, 416 (1992), 505 U.S. at 377 (Stevens, J., concurring).

[73] *Black*, 123 S. Ct. at 1552 (Stevens, J., concurring). The prima facie evidence provisions criminalize some instances of cross burning, which are constitutionally protected forms of symbolic expression. *Id.* (Stevens, J., concurring).

C. *Justice Scalia's Opinion Concurring in Part, Concurring in the Judgment in Part and Dissenting in Part*

Justice Scalia concurred with the majority that a state may prohibit cross burning with the intent to intimidate and joined in that part of the opinion.[74] Justice Scalia also concurred that the Court should vacate and remand the judgment of the Virginia Supreme Court.[75]

Justice Scalia wrote separately to describe why he disagreed with the plurality's decision to declare the prima facie evidence provision unconstitutional.[76] Justice Scalia noted that the established meaning of prima facie evidence in Virginia is evidence that is sufficient, by itself, to establish a particular fact but only to the extent that the evidence goes unrebutted.[77] In light of the fact that prima facie evidence may be rebutted at trial, Justice Scalia rejected the plurality's conclusion that the statute was overbroad because it criminalized some protected speech.[78] Assuming, generously, that someone who could easily prove his own innocence by rebutting the prima facie evidence at trial might choose not to present a defense, Justice Scalia noted that this still would not be enough to render the statute overbroad.[79] Lastly, Justice Scalia observed that it was completely unprecedented and incorrect for the Court to facially invalidate an entire statute on the basis of one troubling jury instruction.[80]

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[74] *Black*, 123 S. Ct. at 1552 (Scalia, J., concurring in part, concurring in the judgment in part and dissenting in part). Justice Scalia noted that he considered this holding consistent with the decision in *R.A.V. Id.* (Scalia, J., concurring in part, concurring in the judgment in part and dissenting in part).

[75] *Id.* (Scalia, J., concurring in part, concurring in the judgment in part and dissenting in part). Justice Scalia believed that the Virginia Supreme Court should have the opportunity to authoritatively construe the prima facie evidence provision. *Id.* (Scalia, J., concurring in part, concurring in the judgment in part and dissenting in part).

[76] *Id.* (Scalia, J., concurring in part, concurring in the judgment in part and dissenting in part). Justice Scalia felt that the plurality incorrectly interpreted the meaning of the provision. *Id.* (Scalia, J., concurring in part, concurring in the judgment in part and dissenting in part).

[77] *Id.* at 1553 (Scalia, J., concurring in part, concurring in the judgment in part and dissenting in part). Justice Scalia began with a common law definition of prima facie evidence and proceeds through several Virginia cases that specifically interpret the meaning of such evidence. *Id.* (Scalia, J., concurring in part, concurring in the judgment in part and dissenting in part). Justice Scalia noted that, as to this specific provision, the Supreme Court of Virginia has said it protects the Commonwealth from a motion to strike the evidence following its case-in-chief but nothing more. *Id.* (Scalia, J., concurring in part, concurring in the judgment in part and dissenting in part). Thus, anyone arrested for burning a cross in Virginia is free to rebut the presumption that he intended to intimidate with evidence indicating otherwise. *Id.* at 1553-54 (Scalia, J., concurring in part, concurring in the judgment in part and dissenting in part).

D. Justice Souter's Opinion Concurring in the Judgment in Part and Dissenting in Part

Justice Souter wrote a separate opinion to explain why he disagreed with the majority's conclusion that the Virginia statute fell within any of the exceptions allowing content-based distinctions.[81] Justice Souter began by rejecting the majority's contention that the Virginia statute fell within the first *R.A.V.* exception, which permits content-based discrimination because of "the very reason the entire class of speech at issue is proscribable.[82] Then, Justice Souter explained why the Virginia statute was not analogous to any specific example given to illustrate this category of laws.[83] Additionally, Justice Souter observed that the statute should not be allowed under any exception because the prima facie evidence provision raised the possibility that an "official suppression of ideas is afoot."[84] Having concluded that this content based discrimination did not fall within any exception that would allow it, Justice Souter declared the statute unconstitutional.[85] Justice Souter concurred in the Court's judgment that respondent Black's conviction could not stand.[86] However, Justice Souter dissented in the Court's judgment regarding respondents Elliot and O'Mara, because he concluded that their convictions also could not stand.[87]

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[78] *Id.* at 1554 (Scalia, J., concurring in part, concurring in the judgment in part and dissenting in part). Justice Scalia observed that in order for a person to be impermissibly convicted under this statute, as the plurality contemplates, he would have to (1) burn a cross in public, (2) intend not to intimidate, (3) be charged and prosecuted and (4) refuse to put on a defense. *Id.* at 1555 (Scalia, J., concurring in part, concurring in the judgment in part and dissenting in part). Justice Scalia also noted that such a conviction could still be challenged on a case-by-case basis. *Id.* at 1554 (Scalia, J., concurring in part, concurring in the judgment in part and dissenting in part). Justice Scalia stated that there is no basis for the plurality's contention that this provision would sway the jury toward a wrongful finding of an intent to intimidate. *Id.* (Scalia, J., concurring in part, concurring in the judgment in part and dissenting in part).

[79] *Black*, 123 S. Ct. at 1555 (Scalia, J., concurring in part, concurring in the judgment in part and dissenting in part). Justice Scalia noted that where a statute regulates expressive conduct, its scope renders it unconstitutional only when its overbreadth is real and substantial. *Id.* at 1556 (Scalia, J., concurring in part, concurring in the judgment in part and dissenting in part). Justice Scalia also stated that the mere possibility of some impermissible application does not render it unconstitutionally overbroad. *Id.* (Scalia, J., concurring in part, concurring in the judgment in part and dissenting in part). He further observed that the potential improper convictions that the plurality fears are "more appropriately classified as the sort of marginal applications," which are insufficient for facial invalidation. *Id.* (Scalia, J., concurring in part, concurring in the judgment in part and dissenting in part).

[80] *Id.* at 1556-57 (Scalia, J., concurring in the judgment in part and dissenting in part). Justice Scalia observed that this practice would cede too much power over state law to trial judges. *Id.* at 1557 (Scalia, J., concurring in the judgment in part and dissenting in part.) He contended that what the Court ordinarily does, and should have done here, was simply decline to pass on the constitutionality of the statute until the state's highest court provided a binding instruction. *Id.* (Scalia, J., dissenting).

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[81] *Id.* at 1559 (Souter, J., concurring in the judgment in part and dissenting in part). Justice Souter's separate opinion was joined by Justices Kennedy and Ginsburg. *Id.* (Souter, J., concurring in the judgment in part and dissenting in part).

[82] *Id.* at 1559 (Souter, J., concurring in the judgment in part and dissenting in part). Justice Souter observed that the Virginia statute did not fit well with examples given to illustrate the exceptions because none involved communication related to a particular message. *Id.* (Souter, J., concurring in the judgment in part and dissenting in part). Justice Souter stated that the special virulence exception discussed by the majority actually enlarged the scope of *R.A.V.*'s original intention. *Id.* at 1560 (Souter, J., concurring in the judgment in part and dissenting in part). However, even with this expansion, this statute did not fit because of its prima facie evidence provision, which Souter observed, disqualifies the statute from any exception. *Id.* (Souter, J., concurring in the judgment in part and dissenting in part).

[83] *Id.* at 1560 (Souter, J., concurring in the judgment in part and dissenting in part). As to the first example, Justice Souter observed that while distinguishing obscene publications on this basis may not suggest idea discrimination, rejection of a general prohibition of intimidation in favor prohibiting intimidation only by cross burning certainly does. *Id.* at 1560 (Souter, J., concurring in the judgment in part and dissenting in part). Justice Souter also rejected the idea that the Virginia statute is sufficiently analogous to threats to the President, observing that unlike threats to the President, cross burning carries a particular message of white supremacy. *Id.* (Souter, J., concurring in the judgment in part and dissenting in part).

[84] ***Black***, 123 S. Ct. at 1561 (Souter, J., concurring in the judgment in part and dissenting in part). As Justice Souter saw it, the primary effect of the provision was to "skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning." *Id.* (Souter, J., concurring in the judgment in part and dissenting in part). On this basis he concluded that this provision would tend to draw some protected speech within its prohibition of intimidation. *Id.* at 1561-62 (Souter, J., concurring in the judgment in part and dissenting in

E. Justice Thomas' Dissenting Opinion

Justice Thomas dissented because he disagreed with the majority's conclusion that cross burning could ever be constitutionally protected conduct.[88] After an exhaustive review of the Klan's vile history, Justice Thomas asserted, "cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence."[89] Justice Thomas felt that this statute only prohibited

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part).

[85] *Id.* at 1562 (Souter, J., concurring in the judgment in part and dissenting in part). In Justice Souter's view it was inappropriate to view the prima facie evidence provision as an overbroad definition which can be severed or construed more narrowly. *Id.* at 1562 (Souter, J., concurring in the judgment in part and dissenting in part). Justice Souter stated that the appropriate question is whether or not this statute can claim an exception from the general prohibition of content discriminatory laws, which it may not when the terms of the statute indicate that a suppression of ideas is afoot. *Id.* (Souter, J., concurring in the judgment in part and dissenting in part).

[86] *Id.* at 1562 (Souter, J., concurring in the judgment in part and dissenting in part). Souter reasoned that Black was convicted of violating an unconstitutional statute. *Id.* (Souter, J., concurring in the judgment in part and dissenting in part).

[87] *Id.* (Souter, J., concurring in the judgment in part and dissenting in part). Justice Souter concluded that because the statute was invalid at the time of the accused activities, it was irrelevant whether the prima facie evidence provision was given any effect at their trial. *Id.* (Souter, J., concurring in the judgment in part and dissenting in part). Justice Souter saw no reason to remand these cases because no construction of these provisions would change the fact that the whole statute was unconstitutional at the time of respondent's conduct. *Id.* (Souter, J., concurring in the judgment in part and dissenting in part).

[88] *Id.* at 1562 (Thomas, J., dissenting). Justice Thomas stated that cross burning is an act that has acquired a special meaning beyond that which outsiders can comprehend. *Id.* (Thomas, J., dissenting). He characterizes the Klan as a terrorist organization, which in its quest to intimidate, or even eliminate its enemies, utilizes the most vicious of methods. *Id.* at 1563 (Thomas, J., dissenting).

[89] *Id.* at 1564 (Thomas, J. dissenting). Justice Thomas specifically noted that

conduct, not expression, and, therefore, raised no First Amendment issues.[90]

IV. Discussion

In *Virginia v. Black*, the Court continued a significant trend of enhancing the protections of the First Amendment while at the same time clarifying some important First Amendment questions.[91] *Black* is the latest in a line of cases that appear to be limiting *Chaplinsky* and its unprotected categories without completely rejecting them.[92] In *Black*, the Court also reaffirmed a recent commitment to absolute freedom of expression by extending the protections of the First Amendment to one of the most offensive symbols imaginable—the burning cross.[93]

Black is also significant because the Court clearly defined what constitutes a "true threat," categorized intimidation as a

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in the 1950s, the State of Virginia passed a bill to ban cross burning, at the same time that segregation was the prevailing practice and law. *Id.* (Thomas, J., dissenting). According to Justice Thomas, "It strains credulity to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message." *Id.* at 1566 (Thomas, J., dissenting). Even segregationists could tell the difference between terrorism, intimidation and racist expression. *Id.* (Thomas, J., dissenting).

[90] *Id.* at 1566 (Thomas. J., dissenting). "[J]ust as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point." *Id.*

[91] *See supra* notes 28, 34, 35, 42, 44, 49 and accompanying text. Almost all the significant First Amendment cases since *Chaplinsky* have resulted in holdings that broaden the reach of the First Amendment. *See* supra notes 28, 34, 42, 49 and accompanying text. *Black* answered whether all cross burning can be prohibited, whether cross burning with the intent to intimidate can be prohibited and why and how cross burning and other forms of intimidation can be prohibited. *See supra* notes 60, 65 and accompanying text.

[92] *See supra* notes 20, 28, 41, 49, 50 and accompanying text. These cases have employed various methods of limiting the reach of the *Chaplinsky* categories, including narrowly interpreting their scope and enhancing their constitutional protection. *See supra* notes 20, 28, 49, 50 and accompanying text.

[93] *See supra* notes 60, 65 and accompanying text. In the *Black* opinion, the majority specifically referred to cross burning as a particularly virulent form of intimidation yet eight of nine Justices agreed that it can be constitutionally protected speech, with only Justice Thomas disagreeing. *See supra* notes 61, 65 and accompanying text.

"true threat" and reaffirmed that this type of speech may be constitutionally regulated.[94] By categorizing cross burning with the intent to intimidate as a type of "true threat," *Black* has correctly shifted the focus on such conduct to its threatening characteristics and away from its unclear categorization as "fighting words."[95] The Court's holding reconciled two very powerful competing interests, protecting the public from an intense symbol of hate and violence and the First Amendment right to free speech,[96] while at the same time establishing a general principle that can be easily applied to similar cases in the future; hate speech is not protected when done to make others fear for their health or safety.[97] However, in holding that the prima facie evidence provision renders the Virginia statute unconstitutional, the Court clearly indicated that this type of regulation will be closely scrutinized to avoid the possibility that our freedom of expression is unnecessarily sacrificed.[98]

V. CONCLUSION

There are valuable lessons to be learned from the Supreme Court's decision in *Virginia v. Black*. First, all levels of government should recognize that offensive or hateful symbols may have other constitutionally protected uses that would prohibit a complete ban. Additionally, any group wishing to draft legislation prohibiting hate speech in the future should closely follow the teachings of *Black* because the applicable level of scrutiny will reveal even the most minute constitutional defect. Second, those groups that employ hate speech to communicate their message must now carefully monitor their tactics. While their political symbols remain constitutionally protected, their use of fear and intimidation against their perceived enemies can now be prohibited and punished. Third, this holding significantly clarifies several complicated issues and will ease the burden on courts presented with this type of case in the future. By recognizing the damaging nature of intimidation on its victim, the Court's opinion in *Black* emerges from a complicated and confusing line of cases in creating a relatively clear precedent that speech is not protected when it is intended to intimidate.

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[94] *See supra* notes 62, 65 and accompanying text. Previous cases were very unclear in defining a "true threat." *See supra* notes 28, 29 and accompanying text.

[95] *See supra* notes 60, 62 and accompanying text. In *R.A.V.*, the Courts analyzed cross burning under the "fighting words" doctrine, which focuses on the likelihood that a person will react violently. *See supra* notes 56, 57 and accompanying text.

[96] *See supra* notes 11, 12, 13, 43, 44 and accompanying text. The interest in protecting the public was particularly strong in this case given the horrible nature of cross burning. *See supra* notes 1, 60 and accompanying text.

[97] *See supra* notes 62, 66 and accompanying text. Previous cases that analyzed hateful or offensive speech had primarily focused on its likelihood to cause a violent response. *See supra* notes 19, 38, 41 and accompanying text.

[98] *See supra* notes 67, 68, 69, 70 and accompanying text. Despite Justice Scalia's urging to the contrary, this prima facie evidence provision and the jury instructions were strictly construed. *See supra* notes 76, 77, 78, 79, 80 and accompanying text.

Chris L. Brannon

Constitutional Law—Fourteenth Amendment—State Anti-Sodomy Laws as Applied to Consensual Homosexual Activity in the Privacy of the Home Held Unconstitutional

I. FACTS

Houston police, in responding to an alleged "weapons disturbance," entered a residence in which they observed two adult males, John Geddes Lawrence and Tyron Garner (Petitioners), engaged in consensual homosexual conduct.[1] Lawrence and Garner were arrested and charged for violation of Texas' anti-sodomy law.[2] Both men entered pleas of *nolo contendere* at trial and were subsequently convicted.[3]

On appeal to the Court of Appeals for the Fourteenth District of Texas, Lawrence and Garner challenged the constitutionality of their convictions, asserting that the Texas anti-sodomy law violated both state and federal guarantees of equal protection and privacy.[4] The Texas Court of Appeals affirmed the convictions, finding no constitutional infringement.[5] The United States Supreme Court granted certiorari and held: reversed.[6] State laws making private and consensual sexual conduct between adults a crime are unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment.[7]

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[1] Lawrence v. Texas, 41 S.W.3d 349, 350 (Tex. App. 2001) (en banc). Because of the men's subsequent *nolo contendere* plea at trial, the facts and circumstances behind the incident are not in the record. *Lawrence*, 41 S.W.3d at 350.

[2] *Lawrence*, 41 S.W.2d at 350. In Texas, it is a Class C misdemeanor to engage in "deviate sexual intercourse with another individual of the same sex." TEX. PEN. CODE ANN. § 21.06 (Vernon 1994). "Deviate sexual intercourse" is defined by Texas law as "any contact between any part of the genitals of one person and the mouth or anus of another person; or . . . the penetration of the genitals of the anus of another person with an object." TEX. PEN. CODE ANN. § 21.01 (Vernon 1994).

[3] *Lawrence*, 41 S.W.2d at 350. Lawrence and Garner were each assessed a fine of $200 after their convictions. *Id.*

[4] *Id.* The appellants did not assert at trial or on appeal that they had not committed the prohibited acts under the state penal code or that the policemen had acted improperly in entering the residence, but only that the statute under which they were charged was unconstitutional. *Id.*

[5] *Id.* at 362. In addressing the appellants' claim that the Texas statute violated their equal protection rights, the Texas Court of Appeals noted that neither the United States Supreme Court, nor the Texas Supreme Court has found sexual orientation to be a "suspect class" and that the statute could, therefore, only be struck down as a violation of equal protection if the law did not advance a legitimate state interest or was not rationally related to that goal. *Id.* at 353-54. The Court of Appeals found that the prohibition on sexual conduct was constitutional

II. RELATED LAW

The Due Process Clause of the Fourteenth Amendment states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."[8] This Clause has been asserted with varying degrees of success to defend an individual's right to privacy.[9] This section discusses land-

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because the law advanced a legitimate state interest by preserving public morals and was rationally related to the legislature's goal. *Id.* at 357. The Texas Court of Appeals also dismissed the appellants claim that their arrests violated their constitutional right to privacy, finding that no constitutional "zone of privacy" protected homosexual conduct from state interference. *Id.* at 362.

[6] Lawrence v. Texas, 123 S. Ct. 2472 (2003). Justice Kennedy delivered the opinion of the Court, joined by Justices Stevens, Souter, Ginsburg and Breyer, with Justice O'Connor concurring in judgment. *Lawrence*, 123 S. Ct. at 2475. Justice Scalia filed a dissenting opinion and was joined by Chief Justice Rehnquist and Justice Thomas. *Id.* Justice Thomas also filed a separate dissenting opinion. *Id.*

[7] *Lawrence*, 123 S. Ct. at 2476. The Court noted that there was no "individual or societal reliance" on past precedent upholding anti-sodomy laws "of the sort that could counsel against overturning [such precedent] once there were compelling reasons to do so." *Id.* at 2483. The Court found compelling reasons to do so because the litigants were "entitled to respect for their private lives" and the State's intrusion into the home demeaned the lives of homosexuals. *Id.* at 2484.

[8] U.S. CONST. amend. XIV. The Fourteenth Amendment's Substantive Due Process Clause has been asserted by petitioners for a large variety of issues. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (holding that Due Process rights include right of parents to determine upbringing of children); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (holding that Due Process protects teacher's right to teach German); Lochner v. New York, 198 U.S. 45, 53 (1905) (holding that Due Process protects right of worker to contract with his employer freely). *But see* Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488 (1955) (declining to review economic legislation under anything more than rational-basis review for violations of Due Process).

[9] *See* Planned Parenthood v. Casey, 505 U.S. 833, 896 (1992) ("[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); Bd. of Dirs.

mark cases that formed Due Process jurisprudence regarding privacy rights up to the Court's present-day interpretation under *Lawrence*.[10]

A. *Due Process Clause Jurisprudence and the "Penumbral" Zone of Privacy*

In *Griswold v. Connecticut*,[11] the Court considered the constitutionality of a state statute that prohibited the use of drugs or devices of contraception and also levied penalties upon anyone assisting others in the use of contraceptives.[12] The Petitioners, the director of a Planned Parenthood clinic and a physician, were charged with violating the statute when they gave information and medical advice to married persons regarding birth control methods.[13] The Court invalidated the

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of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 547 (1987) (holding that family and other personal relationships may be protected by right to privacy); Roberts v. United States Jaycees, 468 U.S. 609, 631 (1984) (same); Breard v. Alexandria, 341 U.S. 622, 642 (1951) (upholding constitutionality of city ordinance prohibiting solicitors from invading privacy of home); *see also* Caroline L. Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 HARV. C.R.-C.L. L. REV. 89, 99 (1996); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196-97 (1890) (advocating right of privacy for first time).

[10] *See generally* Mark J. Kappelhoff, Bowers v. Hardwick*: Is There a Right to Privacy?*, 37 AM. U.L. REV. 487 (1988) (tracking progression of privacy rights in United States); Stephen O. Ludd, *The Aftermath of* Doe v. Commonwealth's Attorney*: In Search of the Right to be Let Alone,* 10 U. DAYTON L. REV. 705, 718-26 (1985) (examining historical background of right to privacy); Brenda S. Thornton, *The New International Jurisprudence on the Right to Privacy: A Head-On Collision with* Bowers v. Hardwick, 58 ALB. L. REV. 725, 725-30 (1995) (discussing progression of right to privacy before *Bowers*); *see also* Ernest H. Schopler, Annotation, *Supreme Court's Views as to the Federal Legal Aspects of the Right Of Privacy*, 43 L. Ed. 2d 871, *2-*4 (1999) (analyzing Supreme Court decisions involving privacy rights).

[11] 381 U.S. 479 (1965).

[12] Griswold v. Connecticut, 381 U.S. 479, 480 (1965). The appellants contended that Connecticut's law prohibiting the use of contraceptive devices or materials violated the Due Process Clause of the Fourteenth Amendment. *Griswold*, 381 U.S. at 480. .

[13] *Griswold*, 381 U.S. at 480. The appellants had standing to raise the constitutional rights of the married people with whom they had a professional relationship because they had been convicted as accessories. *Id.* at 481. *See* Truax v. Raich, 239 U.S. 33, 38 (1915) (allowing employee to assert constitutional rights of

law, holding that there is a constitutional right of privacy in the marital bedroom in which the State cannot broadly impose upon.[14] The Court noted that previous cases had recognized peripheral rights not explicitly granted under the Constitution.[15] Therefore, though the Constitution does not specifically grant a "right of privacy," the Court reasoned that such a right could be found within the "penumbras" of rights explicitly granted under the Bill of Rights.[16] The Court, in the con-

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his employer); *see also Pierce*, 268 U.S. at 510 (1925) (allowing private school owners to assert rights of potential students and their parents).

[14] *Griswold,* 381 U.S. at 485. The Court rejected the State's argument that because the law addressed "social conditions" the Court should defer to the legislature in determining the propriety of the statute. *Id.* at 481-82. *See generally Lee Optical*, 348 U.S. at 487 (holding that court should not sit as super-legislature in determining propriety of laws regulating economic activity). The Court reasoned that *Lee Optical* was not controlling because the law directly impacted constitutionally protected relations between married couples and their relationship with their physician. *Griswold*, 381 U.S. at 482. The Court found it unthinkable that the Connecticut law might allow the police to "search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives." *Id.* at 486. The Court stated that the overbroad measures of the law in regulating the "*use* of contraceptives rather than regulating their manufacture or sale" swept unnecessarily broadly into protected freedoms. *Id.*; *see* NAACP v. Alabama, 377 U.S. 288, 307 (1964) ("a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms"); *see also* Schneider v. California, 308 U.S. 147, 161 (1939) (holding ordinance banning leaflet distribution invalid because it imposed more broadly upon speech than necessary to achieve governmental goals); Lovell v. Griffin, 303 U.S. 444, 451 (1938) (same).

[15] *Griswold*, 381 U.S. at 482. Justice Douglas wrote for the Court and his opinion pointed out that earlier cases had recognized "penumbral" rights not explicitly granted by the First Amendment. *Id.* at 482. *See Pierce*, 268 U.S. at 534-35 (recognizing non-explicit right of parents to educate their children as they see fit under First and Fourteenth Amendments); *see also* Martin v. Struthers, 319 U.S. 141, 143 (1943) (recognizing that right of freedom of speech and press includes not only right to utter or print, but also right to distribute, receive, and read materials). The Court reasoned, therefore, that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Griswold*, 381 U.S. at 484. *See* Poe v. Ullman, 367 U.S. 497, 516-22 (1961) (Douglas, J., dissenting) ("[t]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution").

[16] *Griswold*, 381 U.S. at 485. The Court reasoned that there were various guarantees under the Bill of Rights creating a penumbral "zone of privacy," including the First, Third, Fourth, Fifth and Ninth Amendments. *Id.* at 484; *see*

cluding paragraph of the majority opinion, was careful to restrict its holding in *Griswold* to protect only a *marital* zone of privacy.[17]

B. Zone of Privacy Extended to Unmarried Persons

In *Eisenstadt v. Baird,*[18] the Court was asked to declare a Massachusetts law that prohibited the distribution of contraceptive materials to unmarried persons unconstitutional.[19] The appellee was convicted under the statute for delivering a lecture on contraception to a group of college students and for giving a young woman contraceptive material afterwards.[20] The Court held the Massachusetts law to be unconstitutional as a violation of "the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment."[21] Discount-

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Boyd v. United States, 116 U.S. 616, 630 (1886) (interpreting Fourth and Fifth Amendments as protecting against all governmental invasions "of the sanctity of a man's home and the privacies of life"); *see also* Mapp v. Ohio, 367 U.S. 643, 656 (1961) (holding that Fourth Amendment creates "right to privacy, no less important than any other right carefully and particularly reserved to the people"). The Court also asserted that the penumbral right to "privacy and repose" had been recognized by earlier cases. *Griswold*, 381 U.S. at 485. *See Breard*, 341 U.S. at 626 (1951) (recognizing right to be left alone in one's own home); Pub. Utils. Comm'n v. Pollack, 343 U.S. 451, 464 (1952) (holding right to privacy is strongest in home); *see also* Beaney, *The Constitutional Right to Privacy*, 1962 SUP. CT. REV. 212; Griswold, *The Right to be Let Alone*, 55 NW. U. L. REV. 216 (1960).

[17] *Griswold,* 381 U.S. at 486. The Court noted that marital privacy in particular should be protected because the relationship between husband and wife is "intimate to the degree of being sacred." *Id. But see* Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) (holding that *Griswold's* reasoning could not be confined to protect only marital privacy).

[18] 405 U.S. 438 (1972).

[19] Eisenstadt v. Baird, 405 U.S. 438, 440 (1972). The Massachusetts statute in question prohibited the distribution of contraceptive materials in general but carved out an exception allowing doctors to administer or prescribe contraceptive materials only to married people. *Eisenstadt,* 405 U.S. at 442.

[20] *Eisenstadt*, 405 U.S. at 440. The Court of Appeals described the recipient of the contraceptive materials as "an unmarried adult woman." *Id.* The Massachusetts Supreme Judicial Court had set aside Baird's conviction for lecturing on the use of contraceptives on the ground that it violated his First Amendment Rights, but had affirmed his conviction for giving away the contraceptive material. *Id.*

[21] *Id.* at 443. The Court noted that while the Equal Protection Clause does not prohibit States from treating different classes of people in different ways, the Clause does require that such classifications be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation

ing the State's contentions that the law's intended purpose was to "defend the sanctity of the home" by preventing premarital sex or for health purposes, the Court found no rational basis for the statute's differentiation between married and unmarried persons.[22] Though the Court based its holding upon the Equal Protection Clause, it noted that *Griswold's* privacy protections were not reserved solely for married couples and that the law might have been invalidated due to unjustified infringements of an individual's right to privacy.[23]

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to the object of legislation." *Id.* at 447 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). *See* McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 809 (1969) ("The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal."); *Lee Optical*, 348 U.S. 483, 489 (1955) (upholding state regulations concerning eye examinations because they were rationally related to public welfare); Ry. Express Agency v. New York, 336 U.S. 106, 110 (1949) (upholding advertising regulation distinctions under rational-basis review). The Court further reasoned that if the Massachusetts law impinged upon fundamental privacy freedoms under *Griswold*, "the statutory classification would have to be not merely *rationally* related to a valid public purpose but *necessary* to the achievement of a *compelling* state interest." *Eisendstadt*, 405 U.S. at 447 (emphasis in original). *See* Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (applying strict review because statute imposed on fundamental right of travel); Loving v. Virginia, 388 U.S. 1, 11 (1967) (applying strict review because statute involved race-related classification); Fleming v. Nestor, 363 U.S. 603, 617 (1960) (requiring only rational-basis review if classification does not involve suspect class or fundamental right). The Court stated that this more demanding test was unnecessary in this case because the Massachusetts law failed to "satisfy even the more lenient equal protection standard." *Eisenstadt,* 405 U.S. at 447. *See also* Romer v. Evans, 517 U.S. 620, 631 (1996) (striking down Colorado constitutional amendment negatively affecting homosexuals under rational-basis review because sexual orientation is not a suspect classification).

[22] *Eisenstadt*, 405 U.S. at 450-53. The Court of Appeals had concluded that the true purpose of the law was to label contraceptives as per se immoral, and that such legislation conflicted with fundamental human rights. Baird v. Eisenstadt, 429 F.2d 1398, 1402 (1970). The United States Supreme Court held that such a finding was unnecessary to resolve the case, however, since "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike." *Eisenstadt*, 405 U.S. at 453.

[23] *Eisenstadt*, 405 U.S. at 453. The Court stated that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion . . . ." *Id.* (emphasis in original). *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969) (holding that Constitution confers "right to be let alone" as "right most valued by civilized man").

C. Declining to Extend the Zone of Privacy to Consensual Sodomy

The seminal case before *Lawrence* concerning Due Process privacy right objections to state laws criminalizing sodomy is *Bowers v. Hardwick.*[24] In *Bowers*, Georgia challenged a Court of Appeals decision ruling that the State's anti-sodomy law violated the respondent's fundamental rights under the Due Process Clause.[25] The Court considered the primary issue in the case to be whether "the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[26] The Court declined to announce such a fundamental right and reversed the Court of Appeals decision invalidating the Georgia law.[27] Finding that homosexual activity was not a liberty

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[24] 478 U.S. 186 (1986).

[25] Bowers v. Hardwick, 478 U.S. 186, 188 (1986). Specifically, *Bowers* involved a constitutional challenge brought by respondent Hardwick after he was charged with violating the Georgia statute for engaging in consensual sodomy in the bedroom of his home with another male. *Bowers*, 478 U.S. at 188. The challenged statute prohibited both heterosexual and homosexual sodomy. *Id.*

[26] *Bowers*, 478 U.S. at 190. The Court interpreted the previous holdings of *Griswold* and *Eisenstadt* to be limited to contraception and not privacy in general. *Id.* Furthermore, the Court pointed out that other holdings involving Due Process rights under the Fourteenth Amendment did not reach to grant a fundamental right to homosexual sodomy. *Id. See* Roe v. Wade, 410 U.S. 113 (1973) (limiting holding only to give individuals fundamental right whether or not to bear children); Prince v. Massachusetts, 321 U.S. 158 (1944) (limiting holding to apply only to family relationships); Skinner v. Oklahoma, 315 U.S. 535 (1942) (limiting holding to issues of procreation); Pierce v. Soc'y of Sisters, 268 U.S. 510, 510 (1925) (limiting holding to only address child rearing and education).

[27] *Bowers,* 478 U.S. at 191. The Court noted that only *fundamental* rights qualified for heightened judicial protection, and that these rights include only those that are "implicit in the concept of ordered liberty" or are "deeply rooted in [the] Nation's history and tradition." *Id. See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (upholding ban on physician-assisted suicide because suicide not right "deeply rooted" in Nation's history); Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (recognizing protections of sanctity of family because "the institution of the family is deeply rooted in this Nation's history and tradition."); Palko v. Connecticut, 302 U.S. 319, 325 (1937) (holding that states were only required via Fourteenth Amendment to adopt those Fifth Amendment guarantees that were "implicit in the concept of ordered liberty . . . ."). *But see* County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) (holding that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry").

"deeply rooted in [the] Nation's history," the Court reasoned that the States were free to regulate such activity so long as their laws were rationally related to a legitimate state interest.[28]

III. *LAWRENCE V. TEXAS*

A. *Opinion of the Court*

In *Lawrence v. Texas*,[29] the United States Supreme Court held that Texas' anti-sodomy statute violated the Due Process Clause of the Fourteenth Amendment as it applied to consensual homosexual conduct between adults in the privacy of the home because the law served no legitimate state purpose.[30] The Court began its discussion by analyzing the cases forming the bedrock of the Fourteenth Amendment's Due Process jurisprudence from which *Bowers* was decided.[31] The Court criticized the holding in *Bowers* as focusing on the narrow issue of whether homosexuals have a fundamental right to engage in sodomy; instead, the Court maintained that the *Bowers* Court should have considered the broader impact such laws would have upon individuals' rights to control their own personal relationships.[32]

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[28] *Bowers,* 478 U.S. at 194-96. The Court pointed out a long history of laws imposing punishments for homosexual sodomy originating from the beginning of the Nation. *Bowers,* 478 U.S. at 193-94. *See generally Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity,* 40 U. MIAMI L. REV. 521, 525-27 (1986) (discussing ancient roots of laws against homosexual activity). *But see* ROBERT DESTY, A COMPENDIUM OF AMERICAN CRIMINAL LAW 143 (1882); JOHN WILDER MAY, THE LAW OF CRIMES § 203 (2d ed. 1893) (detailing laws for sodomy, but making no distinction between heterosexual and homosexual conduct). The Court also declined to accept the respondent's argument that the Georgia statute had no rational basis since it was based solely upon "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable." *Bowers,* 478 U.S. at 196. In refuting the respondent's claim, the Court pointed out that the law is "constantly based on notions of morality, and if all laws representing immoral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." *Id. But see* Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992) (holding that Court's obligation is to "define the liberty of all, not to mandate [its] own moral code"). *See also* CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION – A FIRSTHAND ACCOUNT 81-84 (1991) (criticizing *Bowers* for faulty reasoning and reliance upon historical inaccuracies); RICHARD POSNER, SEX AND REASON, 341-50 (1992) (same).

[29] 123 S. Ct. 2472 (2003).

[30] Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003). Justice Kennedy delivered the opinion of the Court, in which Justices Stevens, Souter, Ginsburg and Breyer joined. *Lawrence,* 123 S. Ct. at 2475. The Court concluded that its previous rationale in *Bowers* could not withstand careful analysis and that the case should, therefore, be overruled. *Id.* at 2483.

[31] *Lawrence,* 123 S. Ct. at 2477. In its discussion, the Court cited *Pierce*, *Meyer*, *Griswold*, *Eisenstadt*, *Roe* and *Carey* as examples of the use of the Due

Additionally, the Court pointed out that there is no long-standing history of statutes directed at "homosexual conduct as a distinct matter."[33] Therefore, the Court reasoned, *Bowers'* reliance on historical proscriptions against same-sex sodomy was overstated.[34] The Court stated that, regardless of the jurisprudence predating modern times, the laws of the past half century should carry the most weight in deciding the current issue.[35]

Process Clause to protect an individual's liberty interests. *Id.* The Court further noted the factual similarities between *Bowers* and *Lawrence*, but pointed out that the law in *Bowers* was different than the one in *Lawrence* in that the Georgia statute had prohibited sodomy between any persons, regardless of whether they were the same sex. *Id.* at 2477.

[32] *Id.* at 2478. The Court reasoned that the laws involved in *Bowers* and *Lawrence* do more than simply prohibit a sexual act, rather their "penalties and purposes . . . have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home." *Id.* Furthermore, the Court contended, these laws sought to control "a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." *Id.*

[33] *Id.* at 2478-79. The Court noted that though there is a long history of laws in the country proscribing sodomy, these laws punished heterosexual as well as homosexual conduct. *Id.* at 2478. The Court also pointed out that laws prohibiting sodomy were not enforced with any regularity against "consenting adults acting in private," but were used, rather, to punish predatory acts against non-consenting victims. *Id.* at 2479. Laws specifically targeting homosexuals, the Court stated, were not enacted until the later part of the Twentieth century, and even then only by a few of the States. *Id.*

[34] *Id.* at 2480. The Court conceded that the Court in *Bowers* had made the broader point that homosexual activity was historically considered immoral. *Id.* at 2480. However, the Court cited *Casey* for the proposition that its obligation was to evaluate personal liberties of the petitioners and not to impose its own moral code. *Id.*

[35] *Id.* The Court noted a general trend of the States, as well as other nations, of repealing laws that punished homosexual conduct. *Id.* at 2480-81. The Court further noted that there was a long history of non-enforcement of the remaining anti-sodomy statutes against people who acted in the privacy of their homes. *Id.* at 2481. The Court also noted that there was "an emerging awareness that liber-

Progressing to its primary reason for overturning *Bowers*, the Court cited *Casey* for the principle that the heart of liberty protected by the Fourteenth Amendment is the right of the individual to "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[36] The Court contended that the decision in *Bowers* would deny homosexual persons this right of autonomy by allowing the State to define their existence.[37]

In addressing the petitioners' argument that the Texas anti-sodomy law should be overturned under the Equal Protection Clause, the Court noted that while this may be a viable argument, it was unnecessary because the central holding in *Bowers* was no longer valid.[38] The Court also stated that there was no individual or societal reliance upon *Bowers* of such character to counsel against overruling its holding in light of the constitutional liberty interest that the anti-sodomy laws imposed upon.[39] The Court concluded by stating that the petitioners, as adult practicing homosexuals, were entitled to respect for their lifestyles and that the State could not demean their existence by regulating their private sexual conduct.[40]

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ty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.* at 2480.

[36] *Lawrence*, 123 S. Ct. at 2482. The Court emphasized the right of an individual to make choices intimately connected with the "attributes of personhood". *Id.* at 2481.

[37] *Id.* at 2481-82. The Court dismissed the State's argument that because the offense in question was classified as a minor offense in Texas it did not infringe on the petitioners' liberty interests. *Id.* at 2482. The Court noted the far-reaching effects a conviction of such a minor offense would have upon the petitioners, including carrying a criminal record, being subject to registration laws of various states and collateral consequences such as having to report convictions on job application forms. *Id.*

[38] *Id.* at 2482. The Court declined to overturn the Texas law on equal protection grounds because of its concern that legislatures would simply re-draft sodomy prohibition laws to apply equally to heterosexual and homosexual participants. *Id.* The Court also noted the continuous stream of criticism of the holding in *Bowers*. *Id.* at 2482-83.

[39] *Id.* at 2483. The Court emphasized that while stare decisis does play a crucial role in the judicial system, it is a policy principle and not a mechanical formula requiring adherence. *Id.* Citing Justice Stevens dissenting opinion in *Bowers*, the Court asserted that a governing majority's view of a particular act as being immoral is not a sufficient justification for a statute proscribing the conduct. *Id.* at 2483-84.

[40] *Id.* at 2483-84. The Court reasoned that the Texas law furthered no legit-

B. Justice O'Connor's Concurring Opinion

Justice O'Connor concurred in the *Lawrence* decision but stated that she would invalidate the Texas law under equal protection grounds only.[41] While noting that laws affecting economics or tax legislation are normally found constitutional under rational basis review, Justice O'Connor pointed out that it is much more likely for a law to fail the rational basis test when it acts to inhibit personal relationships.[42] Justice O'Connor dismissed the State's argument that its anti-sodomy law satisfied rational basis review because it served a legitimate state interest in promoting morality because moral disapproval, by itself, is insufficient to pass constitutional muster under the Equal Protection Clause.[43] Justice O'Connor noted that the effect of the Texas law was to target homosexuals as a class and single them out for "discrimination against [them]

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imate state interest to justify its imposition upon consensual sexual conduct in the privacy of the home. *Id.* However, the Court was careful to note that its holding did not "involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 2484.

[41] *Lawrence*, 123 S. Ct. at 2484 (O'Connor, J., concurring). Justice O'Connor defended the Court's previous holding in *Bowers* and did not join with the Court's current decision to overturn it. *Id.* (O'Connor, J., concurring).

[42] *Id.* at 2485 (O'Connor, J., concurring). Justice O'Connor noted that the Texas law sought to inhibit personal conduct between only same-sex partners and did not regulate the same conduct between opposite-sex partners. *Id.* (O'Connor, J., concurring). She further noted that "Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else." *Id.* at 2485-86 (O'Connor, J., concurring). "When a law exhibits . . . a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." *Id.* at 2485 (O'Connor, J., concurring).

[43] *Id.* at 2486 (O'Connor, J., concurring). Justice O'Connor, citing *Romer*, asserted that moral disapproval of a certain group could not be sufficient justification for a statutory classification. *Id.* (O'Connor, J., concurring). She further stated that due to the rarity of enforcement of the Texas law, the statute served more "as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior." *Id.* at 2486 (O'Connor, J., concurring). In response to the State's assertion that the anti-sodomy law did not discriminate against homosexuals as a group but rather only against homosexual conduct, Justice O'Connor noted that the law directly regulated conduct that was so closely correlated with being a homosexual that it defined the class. *Id.* at 2487 (O'Connor, J., concurring).

as a class in an array of areas outside the criminal law."[44] Finding that Texas could assert no legitimate state interest in support of its anti-sodomy law, Justice O'Connor argued that the statute would fail any standard of review under the Equal Protection Clause.[45]

C. *Justice Scalia's Dissenting Opinion*

Justice Scalia dissented in the *Lawrence* decision and criticized the majority for holding that the Texas sodomy law furthered no legitimate state interest.[46] Justice Scalia argued that the majority's decision not to adhere to stare decisis was incorrect because many of the arguments the majority proffered in favor of overruling *Bowers* could equally be applied in support of overruling *Roe*, "which [the] majority surely has no disposition to overrule."[47] Justice Scalia also expressed a great concern over the "massive disruption of the current social order . . . the overruling of *Bowers* [entailed]."[48]

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[44] *Id.* at 2487 (O'Connor, J., concurring). Justice O'Connor noted that because the statute brands homosexuals as criminals, it sanctions discrimination against the class in a number of areas outside of criminal law. *Id.* (O'Connor, J., concurring).

[45] *Id.* at 2488 (O'Connor, J., concurring). Justice O'Connor was careful to note that her ruling finding the Texas classification unconstitutional under the Equal Protection Clause was limited to consensual conduct in the privacy of the home. *Id.* at 2487 (O'Connor, J., concurring). According to Justice O'Connor, other laws that singled out homosexuals as a class might pass rational basis review if the State was able to assert a legitimate interest, "such as national security or preserving the traditional institution of marriage." *Id.* at 2487-88 (O'Connor, J., concurring).

[46] *Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting). Justice Scalia was joined by Chief Justice Rehnquist and Justice Thomas in his dissent. *Id.* (Scalia, J., dissenting). Justice Scalia contended that the majority of the Court's opinion bore no relation to the actual holding that the law furthered no legitimate state interest. *Id.* (Scalia, J., dissenting). Justice Scalia noted that the majority discussed "fundamental propositions" and "fundamental decisions" in its opinion but did not declare the right to practice homosexual sodomy as a fundamental right. *Id.* (Scalia, J., dissenting). Thus, Justice Scalia continued, while the majority overruled the *outcome* of *Bowers*, it left *Bowers'* central legal conclusion, that there is no "fundamental right to engage in homosexual sodomy," untouched. *Id.* at 2488 (Scalia, J., dissenting).

[47] *Id.* at 2489 (Scalia, J., dissenting). Justice Scalia argued that contrary to the Court's reasoning in *Lawrence*, the "widespread opposition to *Bowers*" is a compelling reason to uphold the sodomy law or else risk subverting the Court's legitimacy out of an appearance that the Court is overruling "under fire." *Id.* at 2488-89 (Scalia, J., dissenting). Justice Scalia noted that *Roe* continues to sustain continued criticism as did *Bowers*, and he also pointed out that the foundations of

In addition to criticizing the majority's non-adherence to precedent, Justice Scalia also argued that the Court's analysis of the constitutional validity of the Texas law was erroneous because the Due Process Clause does not recognize a right to "liberty."[49] Though realizing that the majority did not announce a fundamental right to engage in sodomy, Justice Scalia addressed the issue and concluded that no such right existed because it was not "deeply rooted in [the] Nation's history and traditions."[50] Justice Scalia also concluded that

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Roe's holding had been eroded by the Court's subsequent holding under *Glucksberg*. *Id.* at 2489 (Scalia, J., dissenting).

[48] *Id.* at 2491 (Scalia, J., dissenting). Justice Scalia cited a long list of opinions relying upon *Bowers* as support for their decisions in argument against the majority's statement that there was "no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding . . . ." *Id.* at 2490 (Scalia, J., dissenting). Furthermore, Justice Scalia was concerned with the far-reaching impact the overruling of *Bowers* may have upon laws regulating "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity . . . " since all such offenses are sustainable only "in light of *Bowers'* validation of laws based on moral choices." *Id.* (Scalia, J., dissenting). Additionally, Justice Scalia called into question the continuing validity of laws preventing homosexual conduct by military personnel under the Court's holding in *Lawrence*. *Id.* at 2490 n.2 (Scalia, J., dissenting).

[49] *Id.* at 2491 (Scalia, J., dissenting). Justice Scalia pointed out that all laws impose restrictions upon a person's liberty, and that the Fourteenth Amendment "*expressly allows* States to deprive their citizens of 'liberty,' so long as 'due process of law' is provided." *Id.* (Scalia, J., dissenting). Justice Scalia reiterated the principle that only fundamental rights warrant a heightened investigation into laws infringing upon them. *Id.* at 2491-92 (Scalia, J., dissenting). He then pointed out that the majority opinion failed to disturb the central holding in *Bowers*, that the Constitution recognized no fundamental right to engage in homosexual sodomy. *Id.* at 2492 (Scalia, J., dissenting). Justice Scalia argued that the majority's proclamation that there "is no longstanding history in this country of laws directs at homosexual conduct as a distinct matter" was immaterial, since there clearly is a long history of prohibitions against sodomy in general. *Lawrence*, 123 S. Ct. at 2493 (Scalia, J., dissenting).

[50] *Id.* at 2494 (Scalia, J., dissenting). Justice Scalia criticized the majority's belief that the laws of the past half century should have the most relevance in determining protected rights under the Fourteenth Amendment. *Id.* at 2492-93 (Scalia, J., dissenting). Justice Scalia pointed out that States have enforced sodomy laws in the distant past as well as "in the past half century." *Id.* at 2492 (Scalia, J., dissenting). In addressing the majority's assertion that these laws were rarely enforced, Justice Scalia argued that this result was unsurprising consider-

the majority had erred in finding that the Texas law furthered no legitimate state interest because precedent had routinely recognized moral legislation as sufficient justification for various criminal statutes.[51]

Justice Scalia also disagreed with Justice O'Connor's opinion that she would invalidate the Texas law under equal protection grounds because the statute involves a non-suspect classification and is rationally related to a legitimate state interest.[52] Justice Scalia argued that Justice O'Connor's assertion that the Texas law was targeted at homosexuals as a class and not just at their conduct was also erroneous because the same point could be made against any law.[53] Justice

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ing that consensual sodomy normally occurred "on private premises, with the doors closed and windows covered." *Id.* (Scalia, J., dissenting). Additionally, Justice Scalia pointed out that the majority's reliance upon an "emerging awareness" was inapposite because an "emerging awareness," by definition, could hardly be "deeply rooted in [the] Nation's history and tradition." *Id.* at 2494 (Scalia, J., dissenting). Justice Scalia also argued that the majority's deference to foreign views on sodomy laws was misplaced, since the Court is obligated to enforce the American Constitution and not force foreign ideas upon Americans. *Lawrence*, 123 S. Ct. at 2494-95 (Scalia, J., dissenting).

[51] *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting). Justice Scalia noted that there are numerous criminal laws, such as those against "fornication, bigamy, adult incest, bestiality, and obscenity," that are based upon moral judgments of what is acceptable. *Id.* (Scalia, J., dissenting). Justice Scalia further expressed concern that "[i]f, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review." *Id.* (Scalia, J., dissenting).

[52] *Id.* at 2495 (Scalia, J., dissenting). Justice Scalia noted that the statute, on its face, applies equally to all persons because "[m]en and women, heterosexuals and homosexuals, are all subject to its prohibition of deviate sexual intercourse with someone of the same sex." *Id.* (Scalia, J., dissenting). Conceding that the law did make a distinction as far as the sexual partner was concerned because men could only commit an offense with other men and women solely with other women, Justice Scalia maintained that such a distinction could not be a violation of equal protection because the same distinction is made in laws prohibiting same-sex marriages. *Id.* (Scalia, J., dissenting). Justice Scalia argued that because "[n]o purpose to discriminate against men or women as a class can be gleaned from the Texas law," rational-basis review should apply. *Id.* at 2495-96 (Scalia, J., dissenting). As he had argued earlier against the majority opinion, Justice Scalia asserted that moral legislation should readily satisfy rational-basis review so the equal protection challenge should fail. *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting).

[53] *Id.* at 2496 (Scalia, J., dissenting). As an example, Justice Scalia noted that laws against public nudity also target "conduct that is closely correlated with

Scalia also criticized the concurrence's reliance upon a "more searching form of rational basis review," finding no such standard existing in precedent.[54]

Justice Scalia criticized the Court for having "taken sides in the culture war [and] departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."[55] Justice Scalia stated that homosexuals, as a group, should be free to pursue their agenda through the democratic process, but having their views imposed by the Court in the absence of a democratic majority was improper.[56] In conclusion, Justice Scalia expressed concern for the continuing validity of laws prohibiting same-sex marriages, maintaining that the Court's ruling in *Lawrence* eliminates any justification of denying homosexual couples the benefit of marriage.[57]

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being a nudist" and would, under Justice O'Connor's reasoning, be "directed toward nudists as a class." *Id.* (Scalia, J., dissenting). Moreover, Justice Scalia argued that even if the law was directed towards homosexuals as a class, the statute would still only have to be justified by a rational basis, which is "satisfied by the enforcement of traditional notions of sexual morality." *Id.* (Scalia, J., dissenting).

[54] *Id.* at 2496 (Scalia, J., dissenting). Justice Scalia expressed confusion over exactly what Justice O'Connor's standard of review consisted of but concluded that, at a minimum, her review would require that where laws exhibit a "desire to harm a politically unpopular group," such laws must be supported by something more than a rational basis to be constitutional. *Id.* (Scalia, J., dissenting). Justice Scalia further argued that the concurrence's rationale would weaken arguments upholding laws prohibiting same-sex marriages because Justice O'Connor's reasoning for preserving the laws, that they uphold the "traditional institution of marriage," is "just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Id.* (Scalia, J., dissenting).

[55] *Id.* at 2496 (Scalia, J., dissenting). Justice Scalia asserted that the majority opinion was the product of a pro-homosexual rights law-profession culture and that the Court was imposing its personal and non-mainstream views upon the public. *Id.* (Scalia, J., dissenting).

[56] *Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting). Justice Scalia contended that he would allow the States to decide whether or not to criminalize homosexual acts and that homosexuals, as a group, should be free to utilize the democratic process to influence the legislatures. *Id.* (Scalia, J., dissenting).

[57] *Id.* at 2498 (Scalia, J., dissenting). Justice Scalia cautioned that the Court's proclamation that its opinion did not affect whether the government must recognize homosexual marriages was ill-founded because by removing moral disapproval as a legitimate state interest to validate the statutes, the *Lawrence* holding leaves nothing to justify the laws. *Id.* (Scalia, J., dissenting).

D. Justice Thomas' Dissenting Opinion

Justice Thomas dissented separately in the *Lawrence* opinion to express his belief that the Texas law was "uncommonly silly."[58] Despite this belief, Justice Thomas stated that his duty was to decide cases pursuant to the Constitution and would, accordingly, hold that there is no constitutionally protected interest in a right of privacy that would invalidate the Texas law.[59]

IV. DISCUSSION

In *Lawrence v. Texas*, the United States Supreme Court reinforced past precedent recognizing privacy rights by explicitly extending Due Process protections to individuals regarding consensual sexual activity in the privacy of the home.[60] The decision in *Lawrence* also reveals the Court's desire to recognize homosexuals' rights and shield their private conduct from State execration.[61]

While the Court's decision was more in keeping with recent caselaw recognizing an "emerging awareness" of homosexual rights, the underlying rationale for its decision may jeopardize other state laws based upon "moral legislation."[62] It is impossible to foretell exactly what impact the Court's decision will have upon the future development of Due Process jurisprudence; however, the courts will certainly be faced with a barrage of suits claiming unrecognized rights in light of the Court's holding in *Lawrence.*[63]

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[58] *Id.* at 2498 (Thomas, J., dissenting). Justice Thomas stated that utilizing valuable law enforcement resources for the punishment of persons engaged in "noncommercial consensual conduct with another adult" was wasteful. *Id.* (Thomas, J., dissenting).

[59] *Id.* (Thomas, J., dissenting). Justice Thomas stated that he could find no general right to privacy protected by the Bill of Rights nor other parts of the Constitution. *Id.* (Thomas, J., dissenting).

[60] *See supra* notes 8, 9, 23, 26 and accompanying text. The Court in *Lawrence* clearly declared that the States had no legitimate interest in invading the privacy of the home to enforce anti-sodomy laws and, in the process, may have signaled an end to "moral legislation." *See supra* note 40 and accompanying text.

[61] *See supra* notes 7, 32, 34, 35, 55 and accompanying text. Though the Court declined to announce a fundamental right to engage in homosexual conduct, it is clear from the Court's recognition of the importance of homosexual relationships that state laws targeting homosexuals, either as a class or aimed at conduct closely related with the class, will be undergo a higher degree of scrutiny in future litigation. *See supra* notes 35, 46 and accompany text.

[62] *See supra* notes 28, 40, 45, 48 and accompanying text. Though the Court attempted to limit its holding to the facts of the case, the rationale behind *Law-*

V. CONCLUSION

Lawrence v. Texas recognizes a constitutional right of privacy protecting consensual homosexual conduct in the home from broad intrusions by the State. The Court invalidated state sodomy laws that prohibited such conduct by declaring that an electorates' notion of morality, by itself, is insufficient to validate a statute under Due Process rational-basis review. The decision in *Lawrence*, while in keeping with recent caselaw recognizing homosexual rights in general, may provide ammunition to opponents of other state laws based primarily upon moral disapprobation. Only time will determine, however, if Due Process protections can be successfully extended by litigants to reach outside of privacy rights protecting homosexual activity under the reasoning in *Lawrence*.

Paul G. Sherman

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rence could be used by future litigants to seek the invalidation of other laws based primarily upon notions of morality. *See supra* notes 40, 48, 51.

[63] *See supra* notes 54, 57 and accompanying text. Laws, such as those prohibiting same-sex marriage, adult incest and bestiality, rely heavily upon moral disapprobation for validation under rational-basis review and may not be able to logically survive an assault under the Court's reasoning in *Lawrence*. *See supra* notes 51, 54, 57 and accompanying text.

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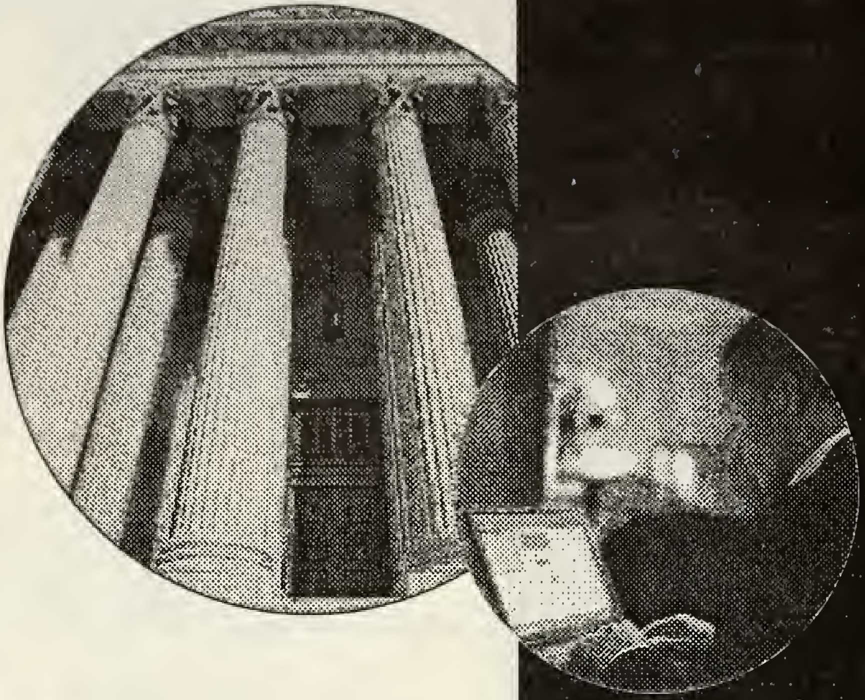

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